Letters of Blood and Fire: A Socio-Economic History of International Law

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Abstract

The financial crash of 2007-2008 brought words like ‘capitalism’, ‘capital’, and ‘socialism’ back in vogue. However, the discipline of international law remains to reflect systematically on its relationship with the ways in which wealth and power are produced and distributed.

This thesis examines the relationship between international law, imperialism and capitalism through historical lenses, arguing that the diffusion of capitalist relations is a core function of international law. Analysing the nineteenth-century ‘standard of civilisation’, I contend that transforming (semi)colonised polities into centralised, territorialised states operating as guarantors of capitalist relations of production was at the core of the concept. Extraterritoriality in Japan and the Ottoman Empire serves as a case study to verify this statement and to highlight the transformative functions of the ‘civilising mission’. The Mandates System of the League of Nations established a system of partial internationalisation of this transformative process, while attempting to safeguard the long-term interests of capital through the introduction of limited forms of welfarism.

My thesis then argues that decolonisation assumed the form of national statehood due to the transformative functions of nineteenth-century international law. Therefore, the attempt to push for a New International Economic Order was both a challenge to contemporary international law and a reaffirmation of its role in promoting capitalist relations on a global level. These reformist attempts did not succeed, however, and a new model of capitalist accumulation, neoliberalism, became hegemonic after 1990. The quantitative expansion and qualitative refinement of international law during that period was intrinsically linked to the neoliberal aversion to democratic and mass politics. The neoliberal reconstruction of Iraq in the aftermath of the 2003 invasion is interpreted in the light of this reality. In so doing, my thesis highlights the ongoing synergies between international law and capitalist expansion.

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Declaration

"No part of this thesis has been submitted elsewhere for any other degree of qualification in this or other university. It is all my own work unless referenced to the contrary in the text"

Statement of Copyright

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Introduction

Although I studied jurisprudence, I pursued it as a subject subordinated to philosophy and history.

K. Marx, Preface to A Contribution to the Critique of Political Economy

It is hard to believe that it was only twenty years ago when Anthony Carty was pointing out that, in international law, 'no systematic undertaking is usually offered of the influence of colonialism in the development of the basic conceptual framework of the subject'.[1] In the course of the two intervening decades, significant historiographical work has been undertaken, and colonialism is no longer the absolute 'blind spot' of the discipline.[2] Crucially, much of this historiographical research has been part of a broader critical challenge to international law scholarship. The thesis at hand is situated within this broader context, offering a historical account of international law spanning from the second half of the nineteenth century to the end of the official occupation of Iraq in 2004. Incidentally, it was also in the aftermath of the 2003 invasion of Iraq that Martti Koskenniemi was asking 'What Should International Lawyers Learn from Karl Marx?'[3] Even though in the intervening years the relevant literature has grown exponentially,[4] the question remains partly unanswered. The

[1] A. Carty, *Was Ireland Conquered? International Law and the Irish Question* (Pluto Press, 1996), 5.

[2] Amongst many: G.N. Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (University of Minnesota Press, 1996); D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 Nordic Journal of International Law 445; D.P. Fidler, 'The Return of the Standard of Civilization' (2001) 2 Chinese Journal of International Law 137; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005); M. Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic Journal of International Law, 335; C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006); J. T. Gathii , 'Imperialism, Colonialism, and International Law' (2007) 54 Buffalo Law Review 1013; N. Berman, *Passion and Ambivalence: Colonialism, Nationalism and International Law* (Brill, 2011); S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011); M. Craven, 'Colonialism and Domination' in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012); M. Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3 London Review of International Law 31.

[3] M. Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?' (2004)17 Leiden Journal of International Law 229.

[4] See, for example: A. Carty, 'Marxism and International Law: Perspectives for the American (Twenty-First) Century?' (2004) 17 Leiden Journal of International Law 247; Miéville, (*supra* note 2); S. Marks, 'International

present thesis intervenes in the evolving historiographical debate about international law, applying precisely such a Marxian lens. In a nutshell, in the following chapters, I will attempt a history of international law *as an integral part of the history of the capitalist mode of production*. Before doing so, a number of theoretical and methodological clarifications are warranted. I will proceed in three steps. First, it is essential to present the core features of Marxian thought, especially regarding the capitalist mode of production. Secondly, I will attempt to detect these aspects of Marxism most relevant to international law and, thirdly, I will briefly visit recent influential historiographical works and show how my approach adds to our understanding of international law.

The capitalist mode of production: a very brief introduction

In a recent contribution, Martti Koskenniemi problematises international lawyers' (understandable) state-centrism, while both mapping and urging for a re-appreciation of private law and private actors, such as property regimes and colonial companies.[5] Indeed, both private law and, importantly, private power remain largely untheorised and unproblematised by the discipline at a time when wealth inequality and corporate power have reached possibly

historically unprecedented levels.[6] At the same time, crisis looms both in the Global North and the Global South, in the form of financial crashes, state collapse, mass displacement and rapid environmental degradation. This thesis asserts that re-reading the history of international law through

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Judicial Activism and the Commodity-Form Theory of International Law' (2007) 18 European Journal of International Law 199; S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (CUP, 2008); A. Rasulov, '"The Nameless Rapture of the Struggle": Towards a Marxist Class-Theoretic Approach to International Law' (2008) 19 Finnish Yearbook of International Law 243; R. Knox, 'Marxism, International Law, and Political Strategy' (2009) 22 Leiden Journal of International Law 413; G. Baars, '"Reform or Revolution"? Polanyian versus Marxian Perspectives on the Regulation of the Economic' (2011) 62 Northern Ireland Legal Quarterly 415; R. Knox, 'Strategy and Tactics' (2012) 21 Finnish Yearbook of International Law 193; M. Neocleous, 'International Law as Primitive Accumulation: Or, the Secret of Systematic Colonization' (2012) 23 European Journal of International Law 941; G. Baars, 'Capitalism's Victor's Justice? The Hidden Stories behind the Prosecution of Industrialists Post-WWII' in K.J. Heller, G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP, 2013); R. Knox, 'Valuing Race? Stretched and the Logic of Imperialism' (2016) 4 London Review of International Law 81; G. Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy' (2016) 4 London Review of International Law 127.

[5] M. Koskenniemi, 'Expanding Histories of International Law' (2016) 56 American Journal of Legal History 104.

[6] See: Oxfam, 'An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and How This Can Be Stopped' 210 Oxfam Briefing Paper (Oxfam, 18 January 2016), available at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf [last accessed 23 June 2016].

Marxian lenses could be useful in at least two ways. First, Marxian theory could help us to bridge the gap between emphasis on the state and appreciation of private power, private law and private actors. It does so by conceptualising the state, not as a Schmittian sovereign with its own will, but as a crystallisation of class relations of power. At the same time, my specific approach to Marxian theory emphasises the importance of public power in the constitution, reproduction and legitimisation of a specific form of private power, class relations. Secondly, the deployment of Marxian lenses enables us to move beyond 'false contingencies'[7] and to analyse the role of international law both in the construction of power and in the spread of dispossession, displacement and poverty while acknowledging that these are two sides of the same coin.[8] Within the Marxian trajectory, wealth accumulation can only occur because of the exploitation and dispossession inflicted upon specific parts of the world, be it domestic working classes or colonial territories. Therefore, analysing international law through the prism of Marxism enables us to appreciate and explain the centrality of the state for the discipline, without surrendering unconditionally to the fetishism of the international legal form that generally obscures private relations of power and domination. At the same time, acknowledging the fundamentally competitive structure of society elucidates the inherent biases of the discipline and warrants a responsible, positional thinking about its future and its functions.

Before moving to the specific question of the relationship between colonialism, capitalism and international law, we need to take a step back and discuss a concept central to Marx's thought: the mode(s) of production (*Produktionsweise*). Marx begins with a fairly simple observation: 'In the social production of their existence, men inevitably enter into definite relations that are indispensable and independent of their will, relations of production that correspond to a definite stage of development of their material productive forces.'[9] Simply put, for human societies to maintain their

[7] '[W]e need also to be on guard against what might correspondingly be termed false contingency. For just as things do not have to be as they are, so too history is not simply a matter of chance and will. The concept of false contingency refers to this idea, and to the limits and pressures, tendencies and orientations, over-determination and determination in the last instance, that shape both realities and possibilities.' S. Marks, 'False Contingency' (2009) 62 Current Legal Problems 1, 10.

[8] 'Considered from the standpoint of a concern with that problem, Collier's analysis is notably lacking in attention to the relational dimensions of global poverty. This is epitomised in the notion of the "bottom billion" itself—a number that is relative (to the top or next billion), and yet, as a concept, curiously autonomous and non-relational: these poorest of the poor are simply there, a feature on our analytical landscape. And just as in his work all eyes are on the bottom billion and what we might do to help them, so too in human rights circles the focus is on the victims and on the rights and correlative obligations they may assert. Those who benefit from current arrangements remain comfortably out of view.' S. Marks, 'Human Rights and the Bottom Billion' (2009) 9 European Human Rights Law Review 37, 48-49.

[9] K. Marx, 'Preface to A Contribution to the Critique of Political Economy' in K. Marx and F. Engels, *Selected Works* (Lawrence and Wishart, 1968), Volume 1, 182.

existence, they need to produce the goods and services necessary to this end. However, this production does not happen in a social void; neither is it a neutral, technical process. Rather, it happens within a web of relations of power that exist independently of the will and consciousness of individuals. The specific form of these power relations is not eternal or unchanged. In fact, Marx identified in the same text four different modes of production: 'the Asiatic, ancient, feudal and modern bourgeois modes of production'.[10] In the second volume of *Capital*, Marx further elaborated on the concept: '[w]hatever the social form of production, workers and means of production always remain its factors. But if they are in a state of mutual separation, they are only potentially factors of production. For any production to take place, they must be connected.'[11] Marx went on to mention that, specifically in the capitalist mode of production (CMP), 'the separation of the free worker from his means of production is the given starting point, and we have seen how and under what conditions the two come to be united in the hands of the capitalist'.[12] This immediately adds a third factor to the basic structure of a mode of production: that of the non-worker who exploits the labour-power of labourers.

These factors of production (labourers/direct producers, means of production and appropriators of surplus labour) only meaningfully exist in their mutual entanglement. Balibar argues that despite certain conceptual and linguistic confusions, we can detect two different ways in which the factors of production relate to each other simultaneously in each and every mode of production.[13] First, there is the formal property connection, as traditionally understood by lawyers. This relationship implies the intervention of an individual or a collectivity, who, by the exercise of economic ownership, controls access to the means of production and the reproduction of productive forces. Secondly, there is the connection or real or material appropriation, which designates the relation of the labourer to the means of production. The distinction between the two modes of articulation becomes clearer if we look at historic modes of production, such as feudalism. In feudalism, serfs were tied to the land, which was the most important means of production of the time. This bond inflicted severe restrictions upon the freedom of the serfs, but also meant that the product of their labour could not be automatically deprived from them, precisely because of this formal property relation that tied them to

[10] Ibid., 183.

[11] K. Marx, *Capital: A Critique of Political Economy* (Penguin, 1992) Volume 2, 120.

[12] Ibid.

[13] 'Now we find that *production* itself is a complex reality, i.e., that nowhere is there a simple totality, and we can give a precise meaning to this complexity: it consists of the fact that the elements of the totality are not linked together once, but twice, by two distinct connexions. What Marx called a *combination* is not *therefore a simple relationship between the "factors" of any production, but the relationship between these two connexions and their interdependence*.' E. Balibar, 'On the Basic Concepts of Historical Materialism' in L. Althusser and E. Balibar, *Reading Capital* (B. Brewster tr) (NLB, 1970), 215 (emphasis in original).

the land as much as it tied the land to them. Therefore, feudal lords could not automatically appropriate the product of the serfs' labour. Instead, a complex mechanism of juridical, ideological and military compulsion was in place that safeguarded the extraction of the serfs' surplus-labour and its appropriation by the feudal lords. In short, a clear distinction was in place between property relations and relation of real appropriation.

In accordance with Ellen Meiksins Wood, this thesis will define the CMP as 'the system in which goods and services, down to the most basic necessities of life, are produced for profitable exchange, where even human labour-power is a commodity for sale in the market, and where all economic actors are dependent on the market'.[14] In other words, the CMP is this mode of production where production is organised around exchange and profit. In her definition, Wood also hints at the elementary relationship at the heart of the CMP: the capitalist exploitation of immediate producers. The distinctive characteristic of the CMP is that, unlike other, historical modes of production, labourers are entirely separated from the means of production. Unlike serfs or slaves, labourers under the CMP are not legally, formally linked to the means of production or to the owners of those means in any way. Hence, they are not only legally free, since they are not tied to a feudal lord, slave-owner, or to a plot of land, but they are also free of substantive property. When this is the case, for labourers to survive they need to sell the only commodity in their disposal: their labour-power, their ability to perform labour.[15] This is a freedom that alleviates immediate producers from the violence of slavery or serfdom only to submit them to the inner logic of the market. This remark is crucial in order to comprehend Marx's anti-capitalism. For Marx, the CMP appears to equip individuals with choice and freedom, while in reality subjects them to the inflexible imperatives of the market. The labourer is obliged to sell her labour-power in order to survive, while the capitalist is geared in the constant pursuit of surplus-value if they want to survive as capitalists. In this sense, Marx's critique of the CMP was, at least partly, anchored to a quest for human freedom.[16]

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[14] E. Meiksins Wood, *The Origin of Capitalism: A Longer View* (Verso, 2002), 2.

[15] 'For the conversion of his money into capital, therefore, the owner of money must meet in the market with the free labourer, free in the double sense, that as a free man he can dispose of his labour-power as his own commodity, and that on the other hand he has no other commodity for sale, is short of everything necessary for the realisation of his labour-power.' Marx concluded Volume One of the *Capital* with the brief articulation of an explicit 'modern theory of colonisation': K. Marx, *Capital: A Critique of Political Economy* (Lawrence and Wishart, 1954, 1977), Volume 1, 166.

[16] The tragic events of the twentieth century surrounding the authoritarian turn of communism make it easy to forget that Marx described communism as 'the realm of freedom': '[T]he realm of freedom actually begins only where labour which is determined by necessity and mundane considerations ceases; thus in the very nature of things it lies beyond the sphere of actual material production.' K. Marx, *Capital: A Critique to Political Economy* (International Publishers, 1977) Volume 3, 820.

Within the CMP, labourers are separated from the means of production in a way that is historically unprecedented. Therefore, their only means of survival is to sell their labour-power. In the absence of personal ties of allegiance or subordination to capitalists, the way to do so is through entering into contractual relationships in the market. For contracts to be conceivable in the first place, the participants in the labour process need to recognise themselves as free and equal and therefore able to exchange commodities in this market-place. In this context, labour-power is fully commodified and, more generally, wealth presents itself as 'an immense accumulation of commodities'.[17] Crucially, the separation of labourers from the means of production (the property connection we saw above) has direct implications for the real appropriation connection. Since the capitalist owns, by definition, the means of production and since (s)he also purchases the labour-power of immediate producers, 'the labour-process is a process between things that the capitalist has purchased, things that have become his property. The product of this process belongs, therefore, to him.'[18] In other words, in the context of the CMP both legal property and real appropriation are concentrated at the hands of the capitalist. In turn, this has at least two significant implications. First, the capitalist assumes unprecedented control over the labour-process and the labourers are fully submitted to the organisation of the labour-process chosen by the capitalist. Hence, labourers lose control both over the product of their labour and of the labour-process itself. Secondly, this economic structure means that direct compulsion is no longer necessary for the extraction of surplus-labour. No personal relationship of force and hierarchy exists between capitalists and labourers.

A small clarification is necessary before we move on: even though in international law, as well as in everyday parlance, 'exploitation' has connotations of immorality when used in reference to inter-personal relations,[19] for Marx it meant essentially that the dominated class, which in the case of the CMP is the working class, produces not only the means for its own subsistence, but also for the ruling class. As it has been established above, what is purchased by the capitalist, is the human capacity for labour (labour-power) for a specific period of time (for example, for one day). If labour-power is sold for a day, the next question that arises is to determine the length of the working day. Marx argued that, in fact, under the CMP the labourer does not just work the number of hours necessary to produce goods of value equivalent of the value of her sold labour-power. Rather, the ordinary length of the working day includes a number of hours during which the labourer works to produce value not for herself, but for the capitalist who has bought her labour. In the course of this time, the labourer is not

[17] Marx (*supra* note 15), 43.

[18] Ibid., 180.

[19] 'Beyond this engagement with exploitation in the 'positive or neutral' sense, there are also some contexts in which exploitation is used in international legal materials to name a problem, i.e. in a pejorative sense, as part of an effort to secure the redress of something considered bad.' S. Marks, 'Exploitation as an international legal concept' in Marks, *International Law on the Left* (*supra* note 4), 294.

producing to sustain herself, but rather she is producing value for the capitalist. However, since the labourer receives a wage for the sum-total of the one day she has worked, it is not readily evident that the working-day is divided into two parts: one in which she works to create commodities the value of which are necessary for her survival, and a number of hours in which she creates value without being paid for it: 'The wage-form thus extinguishes every trace of the division of the working-day into necessary labour and surplus-labour, into paid and unpaid labour. All labour appears as paid labour.'[20] In this context, the difference between the newly added value and the value of labour-power is the surplus value. By moving from the 'value of labour' to the 'value of labour-power' Marx managed to escape the fact that '[t]he exchange between capital and labour at first presents itself to the mind in the same guise as the buying and selling of all other commodities'.[21] However, labour-power and capital are two fundamentally incommensurable commodities, and they need to be treated as such, even if the 'emptiness' of the legal form of commodity exchange conceals this reality. On the one hand, labour-power is a very special commodity to the extent that its application, labour, creates value:

> our friend, Moneybags, must be so lucky as to find, within the sphere of circulation, in the market, a commodity, whose use-value possesses the peculiar property of being a source of value, whose actual consumption, therefore, is itself an embodiment of labour, and, consequently, a consumption of value. The possessor of money does find on the market such *a special commodity* in capacity for labour or labour-power.[22]

Conversely, capital 'is essentially the command over unpaid labour. […] The secret of the self-expansion of capital resolves itself into having the disposal of a definite quantity of other people's unpaid labour.'[23] Therefore, it is a fundamental interest of capital to expand the working day and to intensify the pace of the labour-process, since this the only method to maintain its existence as a self-valorising value. However, as labour history of the nineteenth century or of modern China vividly shows, this is a process fundamentally destructive for labourers, whose physical and mental condition deteriorates rapidly. Crucially, this process is not due to individual capitalists' 'greediness' or other objectionable moral qualities. Competition between individual capitals compels capitalists to follow this logic without even realising it. If they do not, they will sooner or later go bankrupt and, therefore, stop being capitalists in the first place. Marx's critique of the CMP was not directed against the character of specific individuals, but it was fundamentally a critique of the very structure of the capitalist society.

The 'secret' of primitive accumulation, imperialism and international law

[20] Marx (*supra* note 15), 505.

[21] Ibid.

[22] Ibid., 164 (emphasis added).

[23] Ibid., 500.

So far we have described the elementary structure and functions of the CMP. However, the link between these stipulations and international law, or even imperialism and colonialism, is yet to be established. To do so, we will turn our attention to Part VIII of *Capital*, which is devoted to 'the so-called primitive accumulation'.[24] Since the early stages of his analysis, Marx clearly pointed out the existence of social classes; in this specific instance, the existence of masses in possession of nothing else but their ability to work was not a natural phenomenon:

> One thing, however, is clear – Nature does not produce on the one side owners of money or commodities, and on the other men possessing nothing but their own labour-power. This relation has no natural basis, neither is its social basis one that is common to all historical periods. It is clearly the result of a past historical development, the product of many economic revolutions, of the extinction of a whole series of older forms of social production.[25]

Marx rejected any conceptualisation of the CMP as an ahistorical or natural phenomenon. The CMP did not always exist; neither did it peacefully, automatically, emerge from the gradual expansion of the market. As he pointed out, it was through a process of violence, brute force and systematic dispossession in the context of which the state and (international) law played a pivotal role that the CMP came into existence. In Marx's own, graphic language: '[i]f money, according to Augier, "comes into the world with a congenital blood-stain on one cheek", capital comes dripping from head to foot, from every pore, with blood and dirt'.[26] The creation of free labourers presupposes the radical separation of large masses from the means of production. As always, Marx utilised the specific case of Britain as the model capitalist state of his time, but always with the purpose of drawing general conclusions.[27] In a series of vivid descriptions, Marx sketched the violent process of enclosures when peasants were violently driven out of their land and they were banned access to the 'commons': the forests, rivers and hunting sides that provided them with timber, fish or meat and other essential means of subsistence, partly decoupling their survival from their subjection to wage-labour. Around the same time, draconian laws were put in place punishing harshly those who refused to submit themselves to the discipline of wage-labour by becoming beggars, vagabonds or thieves. Pursuant to the 1572 and 1597 Vagabonds Acts, being an unlicensed beggar was punishable by death, while the 1597 Act introduced the measure of penal transportation overseas. Simultaneously, legislation was introduced that prescribed maximum (but not minimum) wages that enabled and accelerated capitalist

[24] Marx (*supra* note 15), 667-724.

[25] Ibid., 166.

[26] Ibid., 712.

[27] 'In this work I have to examine the capitalist mode of production, and the conditions of production and exchange corresponding to that mode. Up to the present time, their classic ground is England. That is the reason why England is used as the chief illustration in the development of my theoretical ideas. If, however, the German reader shrugs his shoulders at the condition of the English industrial and agricultural labourers, or in optimist fashions comforts himself with the thought that in Germany things are not nearly so bad; I must plainly tell him, "*De te fabula narrator*!" Marx, 'Preface to the first German edition of *Capital'* (*supra* note 15), 19.

accumulation, while attempts to form labour unions were treated as a 'heinous crime'.[28] It was through these draconian methods that 'men are suddenly and forcibly torn from their means of subsistence, and hurled as free and "unattached" proletarians on the labour-market'.[29]

What becomes evident from Marx's account of primitive accumulation is that the emergence of the CMP was far from a smooth, natural or spontaneous process, with people 'realising' the supposed advantages of the free-market. In fact, state-sanctioned violence and law were central to the process. Far from the self-sustaining commodity-form that constitutes the basis of Pashukanian accounts of international law, including Miéville,[30] capital as a social relationship needs the mediation of law both to come into existence and to be reproduced. Unlike the all-against-all violence implicit in the commodity-form that Miéville argues to be the basis of the legal order,[31] the violence of primitive accumulation was centralised and all but chaotic. In fact, it was this very violence that created a social structure where individuals possess fundamentally incommensurable commodities: 'Political economy confuses on principle two very different kinds of private property, of which one rests on the producers' own labour, the other on the employment of the labour of others.'[32]

As has been argued above, the role of the state and law is integral in the emergence and reproduction of the capitalist relations of production. This, indeed, is less clear if we take as the focal point of our analysis the 'commodity-form' and ignore Marx's actual contributions to political economy and the philosophy of history, including his labour theory of value, his explanation of capitalist exploitation and the unpacking of the internal logic of capital. Undeniably, the generalisation of the commodity-form is a significant and integral part of this process. However, the attempt to derive the 'nature' of (international) law exclusively from the commodity-form attaches Marxian theories of law to the seemingly obvious realities of the circulation sphere, ignoring the conceptually unbreakable ties between the sphere of circulation and the sphere of production in Marx. Interestingly, Marx expressly warned against such an approach: '[i]t is typical of the bourgeois horizon, moreover, where business deals fill the whole of people's mind, to see the foundation of the mode of production in the mode of

[28] Ibid., 690.

[29] Ibid., 669.

[30] 'Pashukanis's theory does imply coercion and politics, but does not imply the necessity of a particular form of organisation of coercion. The state certainly "injects clarity and stability into the legal structure", but that is a secondary function.' Miéville (*supra* note 2), 128.

[31] 'I have argued that contrary to some of Pashukanis's claims, disputation and contestation is intrinsic to the commodity, in the fact that its private ownership implies the exclusion of others. […] For a commodity meaningfully to be "mine-not-yours" - which is, after all, central to the fact that it is a commodity to be exchanged - some forceful capabilities are implied.' Ibid., 126.

[32] Marx (*supra* note 15), 716.

commerce corresponding to it, rather than the other way round'.[33] In fact, such an approach aligns Marxist theories of law to traditional liberal theories which attempt to derive public law from private law,[34] and specifically in the sphere of international law, argue that there is essentially a homology between domestic and international law.[35] Therefore, Pashukanian interpretations of law assume that the commodity-owner is somehow a natural figure and not one that emerges through bureaucratic and legal techniques of individualisation and, crucially, the separation of individuals from the means of production and their traditional (legal) links to family, and community. This is a point to which I will return in Chapters 1 and 2 of the present thesis.

Before moving on though, it is essential to stress that Marx did not exclusively focus on Britain when discussing primitive accumulation. In fact, colonialism features centrally in his engagement with the primitive accumulation, also echoing his (and Engels') growing interest in revolutionary politics outside Western Europe.[36] As Mark Neocleous has pointed out, spatial expansionism under the CMP was an issue of great concern to Marx for a number of years.[37] However, post-colonial theorists such as Edward Saïd, who argues that Marx's thought was profoundly Euro-centric, exclusively focus on his 1853 article on the British rule in India,[38] ignoring both his subsequent articles and, crucially, his

[33] Marx (*supra* note 11), 196.

[34] Miéville does so explicitly: 'It is true, in order words, that private law is the basis of public law, as we now perceive them from within a state, separated from each other, but that very distinction is only meaningful as a result of that state's superimposition onto the legal form.' Miéville (*supra* note 2), 137.

[35] 'For the commodity-form theory, international and domestic law are two moments of the same form.' Ibid., 131; 'The formal, abstract equality that Pashukanis ascribed to the legal form very closely resembles one of the key elements of international law: sovereignty.' Knox, 'Valuing Race?' (*supra* note 4), 89.

[36] 'Marx and Engels could barely conceal their joy about the possibility of a bourgeois democratic revolution in China and the world-shaking repercussions it would have. If Western Europe had once been at the center of their worldview, this was certainly no longer true after 1850. Their global orientation allowed them to see clearly beyond "this little corner of the earth" without a hint of nostalgia.' A. Nimtz, 'The Eurocentric Marx and Engels and other Related Myths' in C. Bartolovich and N. Lazarus (eds), *Marxism, Modernity, and Postcolonial Studies* (CUP, 2004), 67.

[37] Criticising Chimni's assertion that colonialism did not directly feature Marx's work (see note 12 above), Neocleous argues that: 'This is a bizarre claim, since capital's tendency to spatial expansion was a main theme of Marx's work.' Neocleous (*supra* note 4), 945.

[38] K. Marx, 'The British Rule in India' *The New-York Daily Tribune* (New York, 25 June 1853). Pranav Jani has offered a persuasive rebuttal to post-colonial critiques of Marx, including their selective treatment of Marx's writings: 'If "Eurocentrism" connotes a sustained discourse and world view that makes (Western) Europe the center of the globe–politically, economically, theoretically and, thus, racially – then the Marx of the India articles is not Eurocentric.' P. Jani, 'Karl Marx, Eurocentrism, and the 1857 Revolt in British India' in Bartolovich and Lazarus (*supra* note 36), 93.

analysis of colonialism in *Capital*. Here, Marx did not attempt to explain the specificities of the historical development of colonialism. In other words, writing on the eve of the 'scramble for Africa' and the revival of European expansionism, Marx did not try to explain why, at that specific moment, this historical development occurred. Rather, his analysis focused on the social implications of colonialism once it is in full swing. What becomes clear is that, for him, colonialism was another manifestation of primitive accumulation. Unlike primitive accumulation in Europe, which was largely complete at the time, primitive accumulation in the colonies was in fact happening in front of his readers' eyes: '[t]here [in the colonies] the capitalist regime everywhere comes into collision with the resistance of the producer, who, as owner of his own conditions of labour, employs that labour to enrich himself, instead of the capitalist'.[39] Once again, Marx stressed that money, machines or otherwise accumulated wealth are *not* capital, for 'capital is not a thing, but a social relation between persons, established by the instrumentality of things'.[40] For this social relationship to be established, the existing modes of production in the colonies had to be dismantled, in order for free labourers to arise and submit themselves to the process of capitalist accumulation. In Marx's late thought, colonialism clearly arises not simply as a process of alien domination and extraction of natural resources for the enrichment of the colonial metropolis. Rather, what clearly distinguishes 'modern' colonialism from ancient practices of conquest and pillage were its profoundly transformative functions. In *Capital* colonialism is clearly conceptualised as another distinct step in the process of primitive accumulation, as a method for the further diffusion of the CMP outside the space in which it first triumphed.[41] It is worth recalling that the closing sentence of the first volume of Capital reads as follows:

> The only thing that interests us is the secret discovered in the new world by the Political Economy of the old world, and proclaimed on the house-tops: that the capitalist mode of production and accumulation, and therefore capitalist private property, have for their fundamental condition the annihilation of self-earned private property; in other words, the expropriation of the labourer.[42]

[39] Marx (*supra* note 15), 716.

[40] Ibid., 717.

[41] The origins and the time-frame of emergence of the CMP are among the most contested topics, both within and beyond Marxist historiography. Here, it is accepted that even though elements of capitalist development could be traced in diverse regions, due to a number of historically contingent reasons, it was in Western Europe, and more specifically in England, that the CMP was first established as the dominant mode of production. In this sense, the CMP was a 'European' phenomenon to the extent that it first firmly emerged in the region that later came to be known as Europe, and not because there was something specific about European religion, culture or 'race' that rendered the CMP both inherently European or an inevitable destiny for Europe: 'The "transition from feudalism to capitalism" is typically treated as a general European - or at least Western European - process. Yet European feudalism in Europe was internally diverse, and it produced several different outcomes, only one of which was capitalism.' Meiksins Wood (*supra* note 14), 73.

[42] Marx (*supra* note 15), 724.

The presumption underpinning this thesis is that, in order to understand fully the functions of international law, we need to accept that the world was not colonised by the amorphous entity known as 'the West', but by capital. As was the case with the overall process of primitive accumulation, this was a process characterised by incredible levels of brutality and violence, a story truly 'written in the annals of mankind in letters of blood and fire'.[43] My thesis invites us to re-conceive international law as precisely written in such 'letters of blood and fire'. In this effort, I am consciously not focusing on specific atrocities of the colonial encounter and the role of international law in legitimising them. It is rather the systemic, structural violence of primitive accumulation and capitalist expansion and the central role of international law in these processes that is the centre of my attention.

Structure, contribution and originality

A number of methodological clarifications is necessary before we proceed. This thesis does not claim to have detected the *essence* of international law; nor does it contend that the only significant function of international law is its profound contribution in the diffusion and consolidation of the capitalist relations of production. To begin with, both within individual social formations and on an international level, class relations are by no means the only aspect of social conflicts, and despite vulgar interpretations of Marxism, the mode of production is only determinative of the social life *in the final instance*. Racial hierarchies, gendered and heteronormative oppression, and clashes between more and less powerful states are just some aspects of social conflict and oppression in which international law is deeply implicated. Recently, Knox has argued that Marxist accounts of international law need to conceptualise race and value as co-constitutive.[44] This is a fruitful line of inquiry and needs to be further pursued. Indeed, the racist and sexist assumptions of international law are too well-documented to be ignored.[45] Even though my thesis will not always expressly invoke

[43] Ibid., 669.

[44] Knox, 'Valuing Race?' (*supra* note 4).

[45] For the racist past and present of international law, see: Grovogui (*supra* note 2); Anghie (*supra* note 2); M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201; A. Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005)43 Osgoode Hall Law Journal 45; F. Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in A. Orford (ed.), *International Law and its Others* (CUP, 2006). For sexism and heteronormativity and international law: H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (Manchester University Press, 2000); G. Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge, 2011); A. Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' (2008) 21 Leiden Journal of International Law 235; Queering International Law (2007) ASIL Proceedings 119; D. Otto, 'A Queer Feminist Perspective on the Productivity of Crisis for International Law and Its Resistive Possibilities' in B. Stark (ed.), *International Law and Its Discontents: Confronting Crisis* (Cambridge University Press, 2015).

these contributions, this should not be read as a rejection. Rather, it should be seen as a mere consequence of the fact that I posed a different question to myself: the contours of the relationship between international law and the CMP. If a holistic history and theory of international law is even possible, this contribution does not claim to be one.

Secondly, even though my argument aspires to take seriously the Marxian argument about the primacy of the class struggle for historical development,[46] reasons of brevity have limited direct references to the class struggle and resistance to international law as a means of diffusion of capitalist relations of production. This is not to imply that international law, colonialism or the CMP somehow remained unopposed; quite the contrary. In fact, as the case of extraterritoriality, which is examined in Chapter 2,[47] shows, class confrontations domestically were of paramount importance for the ultimate success of extraterritoriality and unequal treaties. However, a careful reader will notice that there is a striking omission to this Marxian history of international law: the October Revolution, and the profound challenges it posed to the bourgeois world, including the challenges it posed to international law. This omission is linked to the methodological choice of discussing a 'success story': the story which made the CMP the dominant mode of production on a global level, and how international law is determined by its profound involvement in this process. Discussing the role of the October Revolution and the USSR within international legal history would therefore require a shift of focus. The USSR essentially appears in this thesis at the moment of its collapse, to the extent that it opened the way for the global emergence of a specific variant of the CMP: neoliberal capitalism. More broadly, since my analysis covers a period extending from the second half of the nineteenth century to August 2004, this will necessarily be a partial, fundamentally incomplete, historical account. In the next section of this introduction, I will, however, show that neither was the selection of my case-studies arbitrary, nor did it involve a highly selective approach to my materials that would simply ratify my conclusions.

Thirdly, a clarification needs to be made about the role of individuals and their conscious actions, decisions and initiatives in my historical account. Following the Marxian methodology, 'individuals are dealt with only in so far as they are the personifications of economic categories, embodiments of particular class-relations and class-interests'.[48] Otherwise put, this is not a history of particular international lawyers, diplomats or bureaucrats and their conscious designs about international law and international institutions. Even though the history of ideas, and of professional practices and

[46] Despite the indisputable ideological load of the term, I am using the word 'development' here in the most neutral fashion possible without implying some linear or progressivist understanding of history.

[47] See Chapter 2: 'Extraterritoriality and the civilising mission: international law and social transformation in Japan and the Ottoman Empire' of the present thesis.

[48] Marx, 'Preface to the first German edition' (*supra* note 15), 20-21.

ethics, is on the rise within international legal scholarship,[49] this thesis does not address this question. In fact, my arguments rest on the materialist presumption that, *in the final analysis*, international legal arguments prevail not because of their internal coherence or elegance, but because of the material interests that support them. This is not to say that the history of ideas or sociology of professions are unimportant pursuits for international lawyers, but only to state that ideas cannot be decoupled from the material world within which they develop. It flows naturally from this position that the perception of the individuals involved in my legal histories of the meaning and significance of their actions is not the defining criterion when determining this very meaning. To put it bluntly, there might well be a large gap between what historical actors think they are doing and what they are actually doing. Relatedly, this approach does not require the attachment of blame or the accusation of dishonesty against the actors involved in the historical processes examined. International legal history is emphatically not a history of malicious 'cover ups' in which the actors involved somehow knew that they were promoting the interests of global capitalism and consciously manufactured a story to legitimise their mission and obscure their 'real' motives. From James Lorimer to Samantha Power, even the most important actors of international law are individuals who are *always already* embedded in legal ideology, and to hegemonic ideology more broadly.[50] Due to inherent linguistic constraints, occasionally my argument will appear to assign primary functions to specific individuals within my story, and it might read as if they, with their conscious choices and designs, who determined the history of international law. The reader is kindly requested to read these passages in the light of the present comments.

Written in a time of multiple, inter-locking crises, the thesis at hand is also structured around crises, both within the discipline, and also political and economic crises. It is these crises that define the outer temporal limits of my inquiry. In the world of global politics and economics, three major crises define my narrative. First, my narrative is delimited by the largely forgotten crisis of European capitalism after 1873 and its links to the 'revival' of the colonial project during the last quarter of the nineteenth century. Even though today this is remembered as a period of expansion and growth for capitalism, contemporaries had an acute sense of crisis. Agriculture witnessed a decline in profits, which in turn led to numerous peasant revolts between 1879 and 1894 across Europe, while falling prices depressed the profit rate of business too.[51] Protectionism, economic concentration and economic modernisation

[49] Amongst many: Koskenniemi (*supra* note 2); D. Kennedy, *Of Law and War* (Princeton University Press, 2006); D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

[50] For the most compelling account of international law and ideology, see: S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and a Critique of Ideology* (OUP, 2000).

[51] 'Business had its own troubles. An era brainwashed into the belief that a rise in prices ("inflation") is an economic disaster may find it difficult to believe that nineteenth-century businessmen were much more worried

were on the rise, and so was imperialism. Even though it would be reductionist to establish a simple 'cause and effect' relationship between the 1870s Great Depression and the intensification of imperialism and colonialism, 'it is quite undeniable that the pressure of capital in search of more profitable investment, as of production in search of markets, contributed to policies of expansion-including colonial conquest'.[52] The second crisis that marks my narrative is the 1973 'oil crisis' and the intensification of competition between different paradigms as for what would succeed the collapsing post-war arrangement. Finally, my narrative is delimited by the invasion of Iraq in 2003, with its profound implications for American hegemony, security and stability in the Middle East, and crucially, for the legitimacy of the capitalist model that emerged triumphant from the 1973 crisis: neoliberalism.

Conversely, it will be argued that these were also moments of crisis, or at the very least, of profound transformation for international law. First, both the gradual collapse of sixteenth-century Christian universalism as a normative basis for international law, and the rapid colonisation of the globe, led to a profound transformation of the discipline. This transformation was marked by the emergence of the 'standard of civilisation', which in varying forms dominated the discipline at least until 1945. Even though the seeds for the second disciplinary crisis were already laid in this period, they grew rapidly during the process of decolonisation, and came to full maturity with the official launch of the 'New International Economic Order' in 1973. Even though, at the time, the loss of control over the UN by the US and other Western, capitalist states appeared to be the main crisis evolving, another, much more fundamental crisis was looming. By the end of the 1960s, the Keynesian model of managing capitalism in the West through class compromise and state interventionism had entered a prolonged—and as we know, in retrospect, fatal—crisis. David Harvey summarised this trend as follows:

> Signs of a serious crisis of capital accumulation were everywhere apparent. Unemployment and inflation were both surging everywhere, ushering in a global phase of "stagflation" that lasted throughout much of the 1970s. Fiscal crises of various states (Britain, for example, had to be bailed out by the IMF in 1975–6) resulted as tax revenues plunged and social expenditures soared.[53]

The situation was aggravated by the 1973 oil crisis that endangered the supply of low-cost energy and revealed the shaky foundations of the then prevailing model. Social struggles intensified, and eventually capital emerged triumphant from the process through the construction of neoliberalism as the new hegemonic paradigm of capitalist accumulation. As will be argued in Chapter 6 of this

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about a fall in prices - and in an, on the whole, deflationary century, no period was more deflationary than 1873-1896, when the level of British prices dropped by 40 per cent.' E. Hobsbawm, *The Age of Empire: 1875-1914* (Weidenfeld and Nicolsom, 1987), 37.

[52] Ibid., 45.

[53] D. Harvey, *A Brief History of Neoliberalism* (OUP, 2005), 12.

thesis,[54] the global emergence of neoliberalism triggered a profound, if incomplete, transformation of international law, the antinomies of which brought it to a breaking point in the aftermath of the Iraq invasion, when a thorough and intense programme of neoliberalisation of the Iraqi economy was implemented under the auspices of international law and institutions.

The structure of the present thesis is as follows. In Chapters 1 and 2, I revisit 'misremembered'[55] nineteenth-century international law and the 'standard of civilisation' as its central concept. In Chapter 1, I focus on the emergence of the concept during the nineteenth century, as well as the material and disciplinarian reasons that led to this emergence. Attempting to locate the meaning and social function of the standard, I examine the interpretations offered by four major scholars in the field: Gerrit Gong, Martti Koskenniemi, Anthony Anghie and China Miéville. Acknowledging the merits of each approach, I argue that all four scholars fail to account for the profoundly transformational character of the 'standard of civilisation'. Even though it is undeniably true that civilisation established a hierarchy between political communities, it also carried the promise of its own undoing. However, for this to happen, peripheral societies needed to be transformed, in order to comply with the different parameters of the standard. In the final section of Chapter 1, entitled *A way forward: capitalism as civilisation*, I offer one of my main contributions to our understanding of international law by arguing that compliance with the 'standard of civilisation' essentially meant transformation into a capitalist state. Examining the different requirements for a polity to be considered 'civilised', such as the abolition of slavery, the protection of individual rights, or the construction of a centralised, bureaucratic state, I suggest that these were distinct steps in the completion of primitive accumulation in the (semi)colonies and the establishment and reproduction of capitalist relations of production.

In Chapter 2, I verify this claim by turning to nineteenth-century extraterritoriality and comparing its function and social implications in two social settings where it was applied: Japan and the Ottoman Empire. First, I show that extraterritoriality, that is the exception of imperial powers' subjects from the jurisdiction of semi-colonial states where they resided, was understood at the time as a clear example of the 'civilising mission' of international law, therefore establishing the suitability of my case study. Further to this, I examine separately the process of introduction and, more importantly, the abolition of extraterritoriality in Japan and the Ottoman Empire. My general conclusion is that, for extraterritoriality to be abolished, semi-peripheral societies needed to be transformed into territorially-bound, centrally-organised states that guaranteed capitalist relations of production through different legal devices, such as the protection of individual rights, or the development of commercial law, and

[54] See Section 6:1 'Resolution 1483 and its legal implications: the laws of occupation and neoliberal legality' of the present thesis.

[55] See Kennedy (*supra* note 2).

through the monopolisation of legitimate violence. Crucially, the process of abolition of extraterritoriality reveals a dialectical move at the heart of nineteenth-century international law: the more international law succeeded in its 'civilising mission' by transforming archaic societies into centralised, capitalist nation-states, the more decisively it paved the way for its own demise by creating polities to which direct colonial or imperial domination were unacceptable.

This process of the gradual demise of nineteenth-century international law also sets the background for Chapter 3 of the thesis, which focuses on the Mandate System of the League of Nations. Conceptualised here as a re-invention of the relationship between international law, colonialism and the CMP, the Mandate System was the solution opted for in the management of the colonies of the powers defeated in World War I. It is argued that the Mandate System needs to be situated within the 'civilisation' lineage of international law not simply because the relevant article of the League Covenant (Article 22) expressly mentioned the 'sacred mission of civilisation', but because the System assumed similar functions of social engineering supportive of the CMP as extraterritoriality during the previous century. Further, this chapter focuses on the independence of Iraq under the League and the criteria specified by the Permanent Mandates Committee as necessary for the emancipation of a mandated territory. The argument put forward is that, as the moralistic language of nineteenth-century international law was fading, it became evident that the criteria for statehood under the Mandate System were institutional and economic, rather than 'cultural' or religious. Finally, it is argued that the System was not immune from the welfarist trend of its time. However, this should not be seen as a negation of the implication of international law in the spread of the CMP, but rather as its reaffirmation, since welfarism was an attempt to guarantee the long-term viability of capitalist development in the face of unsustainable capitalist exploitation.

As was mentioned already, a tension between social transformation on the one hand, and the continuity of the Empire on the other, was at the heart of nineteenth-century international law. Chapter 4 of this thesis is centred on this tension. Revising the process of decolonisation, I am arguing that international law and decolonisation existed in a dialectical relationship. As has been argued already, the social transformation brought about through the 'civilising mission' gave rise to the very same material realities that sustained anti-colonial movements and eventually rendered nineteenth-century international law unintelligible. At the same time, however, by shaping material realities on the ground, international law had set the boundaries within which decolonisation was to take place. In other words, the fact that self-determination came to be synonymous with statehood was at least partly attributable to the very functions of international law. To verify this argument, my chapter examines the initiative to establish a New International Economic Order, its profound and honest engagement with international law and its failure, which is attributed to different legal and extra-legal reasons. NIEO's commitment to international law also meant its entrapment was within the well-known oscillation of international law between 'apology' and 'utopia', while its emphasis on development

incorporated numerous assumptions of hierarchy and social engineering of nineteenth-century international law.

The collapse of NIEO, as well as the collapse of the USSR ten years later, paved the way for the global hegemony of neoliberalism, which is the focus of Chapter 5 of the thesis. In the first part of this chapter, I map the core characteristics of neoliberalism as the prevalent model of capitalist accumulation in the twenty-first century. Particular emphasis is paid on neoliberals' thought about the international sphere and international law, arguing that, for a number of neoliberal thinkers, such as Hayek or Roepke, internationalisation of economic governance was a necessary step for dismantling the Keynesian state and establishing a neoliberal state. Drawing from this conclusion, I analyse the qualitative and quantitative expansion of international territorial administration (ITA) after 1990 as a manifestation of neoliberal thinking in the fabric of international law and international institutions. Using the examples of East Timor, Bosnia and Herzegovina, and Kosovo, I argue that international legal techniques were once more of paramount importance in the process of social engineering, in order to manufacture a specific form of capitalist state, the neoliberal state.

This conclusion leads me to my final chapter, which discusses the occupation and reform of Iraq in the aftermath of the infamous 2003 invasion. Challenging the conviction that the problem at the time was the USA's unilateralism and their lack of respect for international law, I show how international law and institutions were profoundly implicated in the neoliberal reform of Iraq. Analysing UN Security Council Resolution 1483, which acknowledged the fact of the occupation and set the parameters for its conduct, I argue that it is far from obvious that these reforms were illegal under the international law of the time. To do so, I focus both on the deeply contradictory wording of the Resolution and on the developments international law underwent after 1990, arguing that even though the nominal structure of international law remained the same, a distinctive form of neoliberal legality was in the making, and the reform undertaken by the Coalition Provisional Authority (CPA) need to be situated within this process. Mapping the profound economic and political reforms applied in Iraq, I document not only how the occupiers attempted to create a 'model' neoliberal state, but also how ITA and other international legal developments since 1990 formed the blueprint for these reforms. Concluding my analysis, I contend that the occupation of Iraq confirms the continuing relevance of my conceptualisation of international law as an enabling method of capitalist accumulation (primitive or not) and capitalist state-building.

To summarise, this thesis offers a new interpretation of the history of international law from the middle of nineteenth century to 2004. Adopting a Marxian methodology, my research examines the profound implication of international law in the global spread of the CMP. Acknowledging the importance of Third World Approaches to International Law (TWAIL) theorists, such as Anghie, for our understanding of international law, I show how the 'standard of civilisation' was essentially

linked with capitalist transformation rather than with some elusive conception of 'Western culture'. Further, my conception departs from Pashukanian accounts of international law to the extent that, unlike Miéville, I consider the state to be essential to the establishment and reproduction of the capitalist mode of production. Correspondingly, this thesis does not conceptualise the relationship between the (capitalist) nation-state and international law as a zero-sum game. By showing that international law and institutions have operated consistently at least since the last quarter of the nineteenth century as a method of capitalist state-building, my work puts into question cosmopolitan understandings of international law as a limitation to the 'excesses' of the nation-state by exposing how the two have been co-constitutive and linked to the process of capitalist expansion. In this sense, my thesis provides an original contribution not only to the history of international law, but also to legal theory and to our doctrinal understanding about the relationship between state sovereignty and international law.

Chapter 1: Decoding 'civilisation': nineteenth-century international law and capitalist expansion

Communism and nihilism are prohibited by the law of nations.

James Lorimer, La doctrine de reconnaissance. Le fondement du droit international

Coincidence and historical irony are mostly in the eye of the beholder. Still, there is a pleasant symmetry to the fact that 1873 was a year of paramount importance, both for the discipline of international law and for (European) capitalism.[1] In that year, while European capitalism was entering a period of crisis and stagnation, the *Institut de droit international* was founded in Ghent, aspiring to become an organ of the 'legal conscience/consciousness of the civilised world.'[2] This chapter scrutinises international legal theory and practice of the nineteenth century with a view to link them to the rapid consolidation and expansion of capitalist relations that took place during that period. Therefore, 1873 functions not as an actual point of rupture, but rather as a symbol of the increasingly symbiotic nature of the two. My inquiry spans from the mid-nineteenth century, which was marked by the rise of the 'unequal treaties', the gradual revival of imperial projects and the establishment of the first university chairs in international law,[3] until the outbreak of World War I that gave the nineteenth-century international legal order a serious - yet not fatal - blow. In doing so, I argue that, since its (re-)birth, international law has been integral in the process of spreading, consolidating and legitimising the capitalist relation of production across the globe. I do so by offering a re-interpretation of the 'standard of civilisation', arguing that conscious intentions, notwithstanding the function of the standard, were linked to the transformation of 'semi-civilised' and 'uncivilised' peripheral societies into centralised, modern, capitalist states.

Despite common narratives, the nineteenth century was not solidly statist and voluntarist. The community of civilised states, rather than unfettered state sovereignty, constituted the basis of international legal obligation. In this context, the concept that provided coherence to the discipline throughout the nineteenth century was that of 'the standard of civilisation'. Four major approaches to

[1] The irony did not escape Koskenniemi: 'The great economic slump had started in Europe in the very year the Institut was established. [...] As Bluntschli noted, in parts of civilised Europe the condition of workers and peasants was worse than that of the slaves of antiquity.' M. Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2004), 58.

[2] 'Il a pour but de favoriser le progrès du droit international : a) En travaillant à formuler les principes généraux de la science de manière à répondre à la conscience juridique du monde civilisé', Article 1 Statute of the Institute of International Law (Ghent, 1873), available at: http://justitiaetpace.org/status.php?lang=fr (original in French).

[3] A chair in international law was only established in Oxford in 1859 and in Cambridge in 1866. See: Koskenniemi (*supra* note 1), 33.

the concept will serve as landmarks: first, I will focus on Gerrit Gong, whose work in the 1980s was decisive in reviving scholarly interest in the area.[4] Secondly, Martti Koskenniemi's approach to the concept will be presented and critiqued to the extent that it is directly linked to his wider, influential historical project on the nineteenth century, but also an integral part of his defence of a 'culture of formalism'.[5] Thirdly, I will engage with Anthony Anghie's argument, since it represents a canonical work of the Third World Approaches to International Law (TWAIL) tradition.[6] Fourthly, the view of China Miéville will be analysed to the extent that his work provides the most comprehensive Marxist history of international law so far.[7] Finally, having discussed the merits, but also the limits of these approaches, I will offer my own interpretation of the standard. Despite indeterminacies and inconsistencies, the pre-conditions for a political community to be considered 'civilised' significantly overlapped with the institutions necessary for the functioning of a capitalist economy. Hence, the standard performed a number of functions: at a primary level, it excluded certain political communities from being subjects of international law. Nonetheless, this exclusion was not definite. Rather, through comprehensive reform, these political communities could acquire 'civilised' status. My argument is that to do so, non-Western political communities should dissolve feudal or 'Asian' structures of production and push through the marketisation of social life, along with all the institutions essential for the sustainment and reproduction of capitalist relations. In other words, the argument put forward here is that, besides being a concept organising hierarchy between political communities, the 'standard of civilisation' was a means for social transformation towards capitalism on a global scale.

1:1 Beyond popular 'illusions': community, subjectivity and civilisation in nineteenth-century international law

The nineteenth century was one of major historical transformations. After a century of relative economic and political stagnation, Europe and large parts of the rest of the world, including China and India, started moving again towards greater state centralisation, the demise of multicultural empires and the advancement of market relations.[8] This trend towards market expansion was particularly felt

[4] G. W. Gong, *The Standard of 'Civilization' in International Society* (OUP, 1984).

[5] Koskenniemi (*supra* note 1).

[6] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004).

[7] C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006).

[8] 'Assuming that the ideas and practices of the early modern state - call it, after Thomas Hobbes's thought-minded treatise of 1651 "Leviathan 1.0" - arose in the seventeenth century, then fell into difficulty in the later eighteenth century, they were reconstituted after 1850 as "Leviathan 2.0".' C.S. Maier, *Leviathan 2.0: Inventing Modern Statehood* (Belknap Press of Harvard University Press, 2012), 15.

in agricultural settings, where revolts were commonplace.[9] The American and the French revolutions symbolised this trend, but should not be treated as isolated phenomena. Under the influence of the French Revolution, the Haitian Revolution erupted. After years of struggle, the island declared its independence (1804) and was recognised by France in 1825, albeit under harsh conditions.[10] The emergence of an independent state governed by people of African descent was a *sui generis*, yet important, moment for international law. This trend was followed by the gradual decolonisation of South America[11] and, finally, by the independence of Liberia in 1847 and the recognition of its independence by the US fifteen years later (1862). These events are important since they indicate that, by the mid-nineteenth century, there was an established trend towards national statehood which was not confined within Europe.

Moreover, the defeat of Napoleon and the establishment of the Holy Alliance in 1815 brought relative stability in Europe.[12] Within this context the British economy flourished,[13] reaching unmatched levels of industrial predominance.[14] Crucially, in 1858 Britain terminated the rule of the British East India

[9] 'All the traditional restraints on the pervasive market mentality, whether religious teachings, feudal privileges, the inscribed status of nobles or churches, or the statutory village control of common lands, were under pressure. Population growth, the cost of military and colonial competition, and the burdens of alleviating poverty ratcheted up the demands for extracting resources and money from the countryside. […] But the result was agrarian unrest, and there was a cluster of major rural revolts in the 1770s and 1780s.' Ibid., 43-44.

[10] 'However, recognition came with a catch. Under the first Article of the Ordinance, Haiti was to open itself up to trade from all nations, with an equal tariff for all, apart from France, which would only pay half the standard rate. The second, most controversial, Article demanded that Haiti pay 150 million francs to compensate for the loss of slave property occasioned by the revolution.' R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 London Review of International Law 81, 119.

[11] For the legal implications of the events, see: W. G. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), 497-502.

[12] The narrative that the Holy Alliance managed to maintain a century of peace in Europe is more of a conservative *post factum* myth than an accurate historical account of the facts. After all, the order the Alliance aspired to establish was already challenged in 1821 with the outbreak of the Greek Revolution, while the conservative domestic alliances that preserved the *status quo* in Europe were unstable too: 'The domestic restoration was breaking down by the 1830s and 1840s. International arrangements collapsed in the 1850s and 1860s.' Maier (*supra* note 8), 49.

[13] Nonetheless, this did not result in prosperity for the working masses, the destitution of which also reached unprecedented levels. See: F. Engels, *The Condition of the Working Class in England* (Penguin, 2009).

[14] 'Even the USA, at the peak of her global supremacy in the early 1950s - and representing a share of the world population three times as large as Britain in 1860 - never reached 53 per cent of iron and steel production and 49 per cent of its textile production.' E. J. Hobsbawm, *The Age of Empire 1875-1914* (Weidenfeld and Nicolson, 1987), 47.

Company over India by transferring it to Queen Victoria.[15] This was a turning point for international law, since it signalled the renewal of imperialism, which would reach unprecedented levels between 1875 and 1914. The unification of Germany meant that a new power also demanded its position in colonial expansion and, also, that Britain's economic supremacy was to be challenged. In this context, the Berlin Conference (1884-1885) attempted to rationalise the 'scramble for Africa' by imposing certain rules, so as to prevent a direct clash between imperial powers in the course of their expansion.[16] Colonial expansion and imperialism coincided with, and were partly caused by, the prolonged, yet forgotten, crisis of European capitalism that became evident around 1873. Prices fell rapidly as European economies were shrinking due to deflation, and domestic market expansion was not fast enough to rectify the falling profit rates.[17] Even though today the link between colonial expansion and capitalist crisis is rarely raised in international legal historiography, especially outside Marxian accounts,[18] as late as 1951, Hannah Arendt considered the connection fairly straightforward:

> Imperialism was born when the ruling class in capitalist production came up against national limitations to its economic expansion. The bourgeoisie turned to politics out of economic necessity; for if it did not want to give up the capitalist system whose inherent law is constant economic growth, it had to impose this law upon its home governments and to proclaim expansion to be an ultimate political goal of foreign policy.[19]

When it comes to the nineteenth century, it is not only the historical facts that are misremembered. The standard narration of international law of the time is centred around the concept of positivism, which in this context is taken to mean that state sovereignty was considered to be the exclusive basis of international legal obligation, while legal theorists were struggling to resolve the riddle of legal order between sovereigns.[20] In fact, this historical narrative is inaccurate to such a degree that David

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[15] 'The Government of the Territories now in the possession or under the Government of the East India Company, and all powers in relation to the Government vested in or exercised by the said Company in trust for Her Majesty, shall cease to be vested in or exercised by the said Company; and all territories in the possession or under the government of the said Company, and all rights vested in or which if this Act had not been passed might have been exercised by the said Company in relation to any Territories, shall become vested in Her Majesty, and be exercised in her name.' Section 1, Government of India Act 1858.

[16] For the Berlin Conference and its contested significance for international law of the time, see: M. Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3 London Review of International Law 31; Miéville (*supra* note 7), 250-56; Koskenniemi (*supra* note 1), 121-27.

[17] 'Conversely, deflation cut into the rate of profit. A large expansion of the market could more than offset this - but in fact the market did not grow fast enough.' Hobsbawm (*supra* note 14), 37.

[18] A notable exception is Koskenniemi, though he raises the point briefly and does not follow it through. See Koskenniemi (*supra* note 1), 58.

[19] H. Arendt, *The Origins of Totalitarianism* (George Allen and Unwin, 1967) 126.

[20] Amongst many: 'Closely allied to the consent-based view of international law was the firm insistence of most positivists on the centrality of the State as the principal (or even the sole) subject of international law, ie as the

Kennedy has called it 'an illusion',[21] since the foundational questions and statist assumptions commonly attributed to nineteenth-century international lawyers in fact did not arise until around the time of the *Lotus* case:

> It was only in the 1927 *Lotus* case, we should remember, that international law first asked itself whether the international legal order was fundamentally one of sovereign freedom or constraint, the Permanent Court concluding that: "restrictions upon the independence of States cannot… be presumed," inaugurating the period of what now seems extreme positivist doctrine. It is interesting, however, that the Court came to this foundational conclusion (in a sharply divided opinion) not because the international legal order inherited from the nineteenth century was well known as one of sovereign freedom, but because whichever way you looked at it, as freedom or as constraint, it would still be necessary to ground either the particular rule or the overall system of constraint in sovereign consent, from which permission could then be granted.[22]

In a nutshell, it was society, rather than unlimited sovereignty, that was seen as the logical precondition for international law: 'It was at this time that jurists and thinkers generally appreciated that Europe consisted of a number of states which were independent, and, at the same time, formed a community.'[23] Westlake further observed that 'consent is the immediate source of international law […] but only the consent of a society can establish rules',[24] while Lorimer identified 'the real power of the whole community subject to the law, as exhibited in and measured by its rational will' as the primary source of positive law.[25]

What is true when it comes to mainstream narratives about the discipline at the time is that the idea of a universally applicable set of laws linked to Christian morality, as articulated for example by

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exclusive bearer of rights and duties on the international plane. States were now perceived as possessing what came to be called "international personality" - and, crucially, as also possessing a set of fundamental rights that must be protected at all times. Foremost of these fundamental rights was the right of survival or self-preservation.' S. C. Neff, 'A Short History of International Law' in M. D. Evans (ed.), *International Law* (4th edn, OUP, 2014), 14; 'I have noted above that, until the 19th century, international law constituted a core of legal standards that attributed great latitude to States in the conduct of their foreign affairs, and substantially refrained from regulating most matters relating to international intercourse.' A. Cassese 'States: Rise and Decline of the Primary Subjects of the International Community' in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012), 60; 'According to positivist theory, the obligation to obey international law derived from the consent of individual States.' J. Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2006), 13.

[21] D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 Nordic Journal of International Law 385.

[22] Ibid., 402.

[23] J. A. Carty, '19th Century Textbooks and International Law' (Doctor of Philosophy Thesis, Jesus College Cambridge, 1972), xxvi.

[24] J. Westlake, *Chapters on the Principles of International Law* (Elibron Classics, 2005), 81.

[25] J. Lorimer, *The Institutes of Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* (Elibron Classics, 2005, 1880), 291.

Vitoria,[26] was on the decline. The idea that law was an indispensable part of communal life and expressed the particular traits and organisation of each people gradually arose in Europe, especially under the influence of the 'historical school' of law.[27] However, this acceptance of the historicity of law did not mean that all legal systems were seen as equally valid. The different 'stages' of human development were in clear hierarchical relation to each other. Therefore, the laws expressing the collective spirit of 'superior' races, states or civilisations were by definition of higher validity.

Therefore, the community of states described above was not inclusive or universal. Rather, as Anghie has pointed out, nineteenth-century international society was fundamentally exclusionary: '[t]his is an important shift: for implicit in the idea of society is membership; only those states accepted into society and which agree upon principles regulating their behaviour can be regarded as belonging to society'.[28] It was the concept of civilisation that provided the criteria for which political communities were part of this international society and which were outside its realm. Even though the concept gained indisputable prominence within the discipline as a whole,[29] Lorimer is commonly considered the 'father' of the concept. For him, humanity was divided in three distinct spheres: the civilised, the barbarian (semi-civilised) and the savage (un-civilised), each sphere representing different degrees of development of the 'human race'.[30] Of the three categories, only the first enjoyed full political status and therefore the states comprising it were full subjects of international law. Semi-civilised polities only enjoyed partial recognition and, therefore, limited international legal personality, while savage peoples were 'purely human', belonging to the realm of nature and not of politics and therefore enjoyed no political recognition under international law.[31] This tri-partite division became commonplace in the writings of nineteenth-century scholars. In 1895, Lawrence defined international

[26] For a summary and critique of Vitoria's natural law, see: A. Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 Social and Legal Studies 32.

[27] 'As it is known, the historical school emerged as a reaction against the abstract rationalism of Enlightenment thought and appeared in the critique against the legislating of comprehensive codes - such as Napoleon's *Code Civil* – that were felt by Savigny to neglect the organic development of law by popular conviction and to freeze it into inflexible and abstract maxims.' Koskenniemi (*supra* note 1), 43.

[28] Anghie (*supra* note 6),48.

[29] 'The existence of a distinction between the civilized and the uncivilized was so vehemently presupposed by positivist jurists, that the state of nature - and therefore naturalism - becomes epistemologically incoherent because it lacks this central distinction.' Ibid., 55.

[30] M. J. Lorimer, 'La doctrine de la reconnaissance, fondement du droit international' (1884)16 Revue de droit international et de législation comparée 333, 335.

[31] 'Que ces sphères résultant de caractères particuliers de race, ou bien de degrés diffèrent dans le développement d'une même race ou bien de degrés différents dans de développement d'une même race, elles ont droit, de la part des nations civilisées, a un triple degré de reconnaissance: la reconnaissance politique plénière, la reconnaissance politique partielle et la reconnaissance naturel ou purement humaine.' Ibid.

law as '[t]he rules which determine the conduct of the general body of civilized states in their dealings with one another'.[32] He went on to distinguish between fully sovereign states at the one end of the spectrum, the 'dwarves of the central African forest' (sic) at the other, and finally polities like Turkey, China or Japan that were somewhere in the middle with respect to the stage of their development and their engagement with and rights under international law.[33] Such was the prominence of the concept that even voices relatively critical of the three-fold distinction, like Hornung, mainly questioned the unconditional moral superiority Western theorists and statesmen claimed through the categorisation, and were not articulating a comprehensive challenge to the concept itself.[34]

Similarly, the concept was central in the actual practice of states. Its first appearance is probably in the 1815 Vienna Declaration on the Abolition of the Slave Trade, a point to which we will shortly return. In the course of the nineteenth century, states would invoke the concept to justify a number of their practices, such as unequal treaties and the establishment of extraterritorial jurisdiction in so-called semi-civilised states.[35] By 1899 the concept had acquired an autonomous existence and even appeared in the preamble of the First Hague Convention on the Laws and Customs of Land Warfare:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[36]

Thus, Gong was right when he stated that '[a]s the principle which distinguished "civilized" from "uncivilized" states, the standard of "civilization" became an integral factor in the changing domain and rules of international law'.[37]

1:2 Civilisation: what's in a name?

Given the distortions of historical memory regarding nineteenth-century international law described above, it is unsurprising that, until relatively recently, the concept of civilisation remained relatively unexamined and untheorised. However, the recent revival of international legal historiography has started rectifying this omission. Mindful of the selectiveness (but not arbitrariness) of the exercise, this contribution will focus on the analyses of Gong, Koskenniemi, Anghie and Miéville. My main

[32] T. J. Lawrence, *The Principles of International Law* (MacMillan and Co, 1895), 1.

[33] Ibid., 58-59. For further analysis of the position of 'semi-civilised' states in international law, see Chapter 2 of the present thesis.

[34] See: J.M. Hornung 'Civilisés et barbares' (1885) 17 Revue de droit international 447.

[35] See Chapter 2 of the thesis at hand.

[36] Preamble, Laws and Customs of War on Land (Hague II) (adopted 29 July 1899, entry into force 4 September 1900) TS 403.

[37] Gong (*supra* note 4), 5.

argument will be that, despite their important contributions to our understanding, all four approaches radically underestimated the material(ist) and transformative dimension of the concept. Furthermore, this is a problem to the extent that it leads to a radical underestimation, or in the case of Miéville, to a significant misunderstanding of the role of international law in the diffusion of capitalist relations of production to colonised or semi-colonised territories.

To begin with, Gong has provided us with the best systematisation of the criteria that legal theorists and practitioners used in order to determine the status of a political community *vis-à-vis* civilisation from the mid-nineteenth century onwards. For him, these criteria were:

> 1. Guarantees of basic human rights, such as life, dignity, property, freedom of movement, of commerce and of religion.
>
> 2. The existence of a vertically and bureaucratically organised state apparatus, capable of armed self-defence.
>
> 3. The legalisation of domestic and foreign affairs. This included the codification and publication of laws, along with the establishment of a professionalised, independent judiciary, as central parts of this process.
>
> 4. Maintenance of permanent diplomatic relations with the outside world.
>
> 5. Abolition of 'uncivilised' practices, such as polygamy, suttee and slavery.[38]

Gong understood the first four criteria to be political and institutional, while the fifth was allegedly cultural. Even though later in this chapter I will challenge the assertion that the abolition of slavery was a cultural demand, the important point here is that, even if we accept Gong's own characterisations, the concept of civilisation manifested a strong institutional aspect. Nonetheless, whenever Gong attempted a broader point about the standard, his analysis leant clearly towards the cultural aspect. For example, in the introduction of the book, Gong noted that 'the imposition of Europe's standard of "civilization" on the non-European world precipitated a confrontation of cultural systems, as fundamentally irreconcilable standards of "civilization" clashed with each other'.[39] Moreover, he conceptualised European expansion as 'fundamentally a confrontation of civilizations and their respective cultural systems',[40] while he also argued that the concept of civilisation was in fact a means to legitimise this very expansion.[41] Therefore, Gong's fragmented conceptual framework is at odds with his own historical findings about the predominantly institutional aspects of the

[38] Ibid., 14-15.

[39] Ibid., xi.

[40] Ibid., 3.

[41] Ibid., 7.

concept. Further to this, Gong's analysis deploys the concept of 'culture' without much elaboration or critical reflection on its content. Even though this point will be made clearer later in the analysis of Anghie's work, it suffices to be said here that 'culture' is used as an all-encompassing term that covers aspects of social co-existence as diverse as religion, inter-personal relations, institutional structures, economic systems or even alimentary preferences. Despite the fact that the historiographical work of Gong is much more nuanced and detailed, the uncritical deployment of the concept serves to obscure rather than to elucidate his factual observations.

In turn, Koskenniemi's argument oscillates between conceptualising the standard of civilisation as largely cultural and emphasising its indeterminate character, which rendered it open to abuse and manipulation by Western states and legal elites. In fact, Koskenniemi advances both arguments in a rather self-contradictory manner. For example, in various parts of his analysis, Koskenniemi maintains that the concept of civilisation was always a rather vague and indeterminate concept.[42] This way, Europeans could deploy the language to legitimise 'what was simply a conjectural policy' and to determine, largely arbitrarily, who was to be admitted to the 'club' of civilisation.[43] At the same time, Koskenniemi argues that the concept of civilisation did have a relatively specified content since it was 'a shorthand for the qualities that international lawyers valued in their own societies playing upon its opposites'[44] or a way to manage 'otherness' and cultural difference through the dynamics of exclusion-inclusion.[45] Setting aside objections to the conceptualisation of the standard of civilisation as primarily the expression of cultural difference, it is essential to note here that Koskenniemi's approach is internally incoherent. If the concept indeed reflected certain values or institutions that international lawyers of the time valued and cultural differences between the West and the periphery, then by definition it was not a 'empty signifier' that could be manipulated by Western powers, or at least this manipulation had some outer limits dictated by the very preferences the concept embodied. Schwarzenberger offered a good summary of the breadth and limitations of the concept as 'an elastic,

[42] 'That "civilization" was not defined beyond impressionistic characterization was an important aspect of its value.' Koskenniemi (*supra* note 1), 103; 'No stable standard of civilization emerged to govern entry into the "community of international law".' Ibid., 134.

[43] 'But the existence of a language of a standard still gave the appearance of fair treatment and regular administration to what was simply a conjectural policy.' Ibid, 135; '[I]f there was no external standard for civilization, then everything depended on what Europeans approved.' Ibid. Schwarzenberger also partly subscribed to this position: 'At the same time, the distinction between civilised and non-civilised communities served less disinterested purposes of Western imperialism and colonialism whenever it was opportune to treat communities on the fringes of the expanding Western world on a footing other than that of sovereign States.' G. Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8 Current Legal Problems 212, 220.

[44] Ibid., 103.

[45] Ibid., 130.

but, nevertheless, relatively objective standard for the treatment of foreign nationals'.[46] Therefore, Koskenniemi's relative emphasis on the 'emptiness' of the concept, even though not without basis, is directly linked to his final conclusion about the merits of a 'culture of formalism' in international law.[47] However, for the history of the standard of civilisation to support this commitment, a somewhat selective reading was warranted that would 'empty' the concept from all its meaning and render its very indeterminacy, instead of its content, a tool at the hands of imperialism. My objection to this approach should not be read to mean that the meaning and content of the standard was perfectly determinate or stable across time and space. However, both legal writings and state practice of the time, as crystallised for example in the case of extraterritoriality,[48] point to a certain point of gravity, a 'core' of the concept that was not directly linked to the opportunistic politics of particular imperial powers of the time, but rather with the fundamental association between international law, imperial expansion and the capitalist mode of production (CMP).

Perhaps the most coherent argument about the concept of civilisation as a way of managing cultural difference is that of Anghie. Indeed, his approach to the concept of 'civilisation' is part of his broader argument about the constitution of sovereignty through international law, or in his own words, 'the relationship between ideas of culture and sovereignty and the ways in which sovereignty became identified with a specific set of cultural practices to the exclusion of others'.[49] For Anghie, the distinction between the civilised and the uncivilised was central to nineteenth century positivism,[50] and expressive of an 'anxiety-driven process of naming the unfamiliar, asserting its alien nature, and attempting to reduce and subordinate it'.[51] Hence, 'the primitive' was at the heart of nineteenth-century international law, since lawyers devoted energy and time finding ways of managing the mysterious 'other'. Indeed, for Anghie this is a process that never came to an end and regularly re-emerges, for example, in the war against terror after 9/11.[52]

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[46] G. Schwarzenberger, *A Manual of International Law* (6th edn, Abingdon, 1976), 84.

[47] 'Even if formalism may no longer be open as a jurisprudential doctrine of the black and white of legal validity (a position perhaps never represented by anyone), nothing has undermined formalism as a culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.' Koskenniemi (*supra* note 1), 500.

[48] For the close conceptual and practical link between extraterritoriality and civilisation in international law, see Section 2:1 'Extraterritoriality as the 'crown jewel' of the civilising mission' of the present thesis.

[49] Anghie (*supra* note 6), 7.

[50] Ibid., 52.

[51] Ibid., 63.

[52] 'My broad argument is that the [war on terror] represents a set of policies and principles that reproduces the structure of the civilizing mission.' Ibid., 309.

Unsurprisingly, Miéville is very suspicious of Anghie's explanation, which he summarily dismisses as 'postmodern commonplace' and 'modern-day banality'.[53] Instead, he offers what he understands to be 'a counterintuitive materialist analysis'.[54] The line of argument is the following: the standard of civilisation arose as the outcome–-and not as the intellectual matrix—of the conclusion of unequal treaties between the West and what came to be understood as 'semi-civilised' countries, such as China or the Ottoman Empire. For Miéville, these polities were 'territorially bounded and internally sovereign'[55] and, therefore, their subjection to unequal treaties created an environment of partial inclusion into international law, which in turn 'was generative of the continuum of civilisation'.[56] Hence, Miéville makes a series of claims that derive from the presumption that it was specific practices of imperialist states that gave rise to the concept and not the other way round, while he insists that the crucial category to be managed were the so-called 'barbarous' states and not the 'savages' of Africa. In his own words, '[b]ecause "civilisation" is not a discursive strategy of "othering", but a result of the paradoxes of actually-existing sovereignty'.[57]

1:3 The limits of received wisdom and an alternative way forward

The standard of civilisation was neither an 'empty signifier', open to manipulation by imperial powers, nor a mere proxy for culture, a fairly vague concept in any event. Moreover, the exclusion of non-Western societies from the realm of international law and politics was not the only, or even the primary, function of the concept. Rather, the standard was structured in such a way so as to allow for, and even promote the radical social transformation of non-Western polities and their inclusion in the cycle of 'civilised' states. If we analyse the pre-conditions for 'civilisation' closely, we can come to the conclusion that they were all institutional, legal and political pre-conditions for the development and stabilisation of the capitalist mode of production. Hence, the engagement of colonial international law with the periphery had broader objectives than simply subjecting the periphery to Western rule. Regardless of the active consciousness of lawyers and politicians, international law was part of a broader trend of social transformation that was taking place at the time and involved the gradual dissolution of feudal or other pre-capitalist forms of social co-existence and the generalisation of market relations.

[53] Miéville (*supra* note 7), 247.

[54] Ibid., 243.

[55] Ibid., 247.

[56] Ibid.

[57] Ibid., 248.

1:3:1 Civilisation v. Culture: The broader origins of the concept and its emphasis on institutions

In order to comprehend the standard of civilisation, it is imperative to situate it within the broader trajectory of progress discourses of the time. In his *Course in Positive Philosophy*,[58] which was gradually published between 1830 and 1842, Auguste Comte provided a linear account of human history. For Comte, history progressed necessarily in three stages—the similarity between Comte's theory and the threefold categorisation of civilisation is noticeable—the theological, the metaphysical and the positive. It is crucial to bear in mind that these stages were not simply in temporal relation, but in a hierarchical one as a matter of logic. The first represented the lowest stage of humanity, when people were subjected to blind faith and superstition. The priest was the central figure of this time. The metaphysical stage was basically that of the Enlightenment, when Reason began to develop and universal rights were mobilised. The jurist dominated this stage. Finally, the positivist era is reduced to the nineteenth century and is characterised by rigorous scientific inquiry, which in turn is put in motion to solve social problems. The scientist is elevated to the absolute authority of the positive stage. Comte's ideas set the stage for a number of social evolutionists, a trend which reached its apogee with Spencer and his fierce opposition to any form of social legislation that would supposedly distort this evolutionary process.[59] Crucially, this progressivist account of human development was not simply an academic argument, but became one of the hegemonic ideas of the time. It is an extreme but not inexplicable example that Brazil put the slogan 'Order and Progress' on its national flag. More generally, the nineteenth century developed an obsession with scientific rationality, which would supposedly reveal the origins of all social problems, including poverty or crime. With the old religious hierarchies collapsing, both at home and abroad, there was an urgent need for new hierarchies. Scientific reason and the emerging 'classificatory mania'[60] provided an alternative paradigm for governing the world in this transitory period. It is telling that Lorimer considered ethnology, 'the science of races', to be the most influential force for international law of his time.[61]

This synergy between international law and social sciences was also of direct relevance to the standard of civilisation as such, since 'civilisation' as a concept did not originate in international law, but had deeper roots. Brett Bowden's work provides us with perhaps the most comprehensive historical account of the broader origins of 'civilisation'.[62] Bowden traces the origins of the word in the three languages that dominated diplomacy at the time: English, French and German. According to

[58] See generally: A. Comte, *Introduction to Positive Philosophy* (Hackett Publishing, 1988).

[59] For Spencer as the actual intellectual 'father' of what inaccurately came to be known as 'social Darwinism', see: P. Dardot and C. Laval, *The New Way of the World: On Neo-liberal Society* (Verso, 2013) 33-35.

[60] Maier (*supra* note 8), 197.

[61] Lorimer (*supra* note 30), 333.

[62] B. Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago Press, 2009).

Bowden, the first recorded use of the word was in French by Boulanger in 766.[63] In this context, the word had a dual meaning, since it was used to signify both the process through which someone became civilised and the outcome of this process. The word appeared in English close to that period too, without it being clear whether that happened under French influence or whether we are confronted with two parallel processes. Tellingly, Gong mentions that the first appearance of the word was in 1772,[64] but Bowden argues that the 'father' of the English word was the philosopher of the Scottish Enlightenment, Adam Ferguson.[65] In both languages, '"*[c]ivilisation*" is not usually used to describe the collective life of just any group, as *culture* sometimes is; it is reserved for collectives that demonstrate a degree of urbanization and organization'.[66] For example, for Ferguson, security of the person and property and of commercial acts and the order necessary to achieve these goals were the essential preconditions for a civilised society.[67] The history of the word in German is quite different, but not necessarily in a way that is significant here. More specifically, *Zivilisation* was commonly juxtaposed to *Kultur*, with the latter denoting 'intellectual, artistic, and religious facts or values'.[68] Thus, numerous German thinkers were fairly dismissive of 'civilisation', while embracing *Kultur* as expressing the inner unity and intellectual heritage of a people.[69] Despite the different lineage of the German version, what all three traditions shared was that the word was not generally used to denote cultural difference or similarity. Even though the disposition of Germans differed from those of English or French thinkers, it is clear that civilisation meant something much more tangible than 'culture', referring instead to political organisation and institutional arrangements. To put it otherwise, 'culture' is arguably a fairly generic concept, but creating a secure environment for commercial transactions is generally not considered to fall under its ambit, provided that we do not stretch the word to cover literally every aspect of social co-existence.

Further, it is crucial that the specific *legal* meaning of the word was fairly close to its original intellectual roots described above, since it emphasised institutional arrangements rather than abstract cultural standards. Indeed, the criteria to be fulfilled could perhaps be said to be influenced by Christianity but did not coincide with it. For example, Lawrence observed that

[63] Ibid., 27.

[64] Gong (*supra* note 4), 47.

[65] Bowden (*supra* note 62), 31.

[66] Ibid., 29 (emphasis in original).

[67] Ibid., 32.

[68] Ibid., 34.

[69] Marx and Engels were, interestingly, among these philosophers: 'Because there is too much civilisation, too much means of subsistence, too much industry, too much commerce.' K. Marx and F. Engels (with an introduction by G. S. Jones), *The Communist Manifesto* (Penguin Books, 2002), 226.

> we have not thought fit to follow the same example of some writers, and limit it still further to *Christian* states. It is quite true that modern International Law grew up among nations which professed Christianity, and that many of its chapters would have to be very differently written if Christian influences had been absent from their formation. But it is also true that more than one non-Christian state has adopted the European international code.[70]

Rather, the criteria a society had to fulfil were of a much more practical character, which is also reflected in the five criteria provided by Gong.[71] This is indeed the main trend in the writings of jurists of the time. For example, in analysing the concept, Westlake wrote that: 'We have nothing here to do with the mental or moral characters which distinguish the civilised from the uncivilised, nor even with the domestic or social habits, taking social in a narrow sense, which a traveller may remark.'[72] Far from it, the existence of a centralised state that would protect activities such as trade was absolutely central in his account.[73] Similarly, Lorimer, despite his general contempt towards Islam, was much more pragmatic when explaining how Algeria would achieve recognition under international law: '[h]ad Algeria come to respect the rights of life and property, its history would not have permanently deprived it of the right to recognition'.[74] As will be shown in the next chapter of this thesis, actual state practice in the field of extraterritoriality also embodied the same principles. Despite racist or religious rhetoric, at the end of the day practice was focused on specific institutional reform, including state centralisation, the monopolisation of violence, adherence to international law and the protection of certain rights closely linked to the market.[75]

Finally, attainability was a crucial characteristic of the concept, thus indicating its close links with progressivist narratives. International lawyers of the time were generally optimistic, arguing that 'uncivilised' societies could progress towards 'higher' stages of development, and indeed civilised peoples had a duty to enable this transition. A clarification is essential here: within the racist intellectual universe of these scholars, this evolution did not mean that non-Western polities would acquire equal status to the Western ones.[76] Indeed, Lorimer was comfortable with the idea that even sovereign European states did not enjoy equal rights under international law, but were in a hierarchical relation depending on their actual power.[77] The Holy Alliance and the Concert of Europe are good examples of the fact that being a member of 'the society of civilised states' did not lead to

[70] Lawrence (*supra* note 32), 5.

[71] See note 38 above.

[72] Westlake (*supra* note 24), 141.

[73] Ibid.

[74] J. Lorimer, *The Institutes of the Law of Nations* (William Blackwood and Sons, 1883) Volume II, 191.

[75] See Section 2:3 'Beyond culture: constructing a materialist narrative of extraterritoriality' of this thesis.

[76] 'That people could progress toward civilization was clear. Less clear was whether or not a hierarchy would persist as people of different points in their development progressed together.' Gong (*supra* note 4), 50.

[77] Lorimer (*supra* note 30), 336.

factual or judicial equality, even within Europe.[78] It was much later that 'sovereignty' became associated with equality in the context of international law. Therefore, the argument that non-Western polities could not become civilised and therefore gain sovereignty because they were not seen as equal is based on an anachronism that links sovereignty with equality. That being said, most legal scholars were reassuring that sovereignty was achievable for non-Westerners. Westlake was clear when writing that: 'The civilisation has grown up by degrees, and populations have become included in it among whom it did not originate.'[79] Rivier was also of the same opinion: '[o]ur community of nations is not a closed one. Just as it opened itself for Turkey, it will open itself for other states as soon as these have reached a level of spirituality comparable to ours.'[80] Gradually, the examples of Japan and the Ottoman Empire were mobilised to show that non-European, non-Christian powers were able to achieve 'civilised' status and become full members of international society. Indeed, the Ottoman Empire was at least partially admitted in 1856,[81] and in 1899 Japan was recognised as fully sovereign, when extraterritoriality was abolished. This was an event of immense historical importance that will be analysed fully in the next chapter of this thesis.[82] What we should bear in mind here is Gong's observation that

> [s]aying race and colour did not matter did not make it so. However widespread the general beliefs about race and colour, their direct influence on the legal standard of "civilization" was circumscribed by the shift toward general principles of progress in civilization, which, at least in theory, denied fixed hierarchies based on immutabilities of race and colour.[83]

To sum up, the standard of 'civilisation' emerged as an 'open' category that could and should be achieved by 'uncivilised' peoples, something that in turn would provide their now transformed political societies with the 'gift' of sovereignty.

If the above observations are correct, the limitations of the four approaches discussed in the previous section become evident. To begin with, both the theory and practice of the time indicate that despite

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[78] See generally: G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, 2004).

[79] Westlake (*supra* note 24), 104.

[80] See note 59. It is no coincidence that Schmitt refers to this precise quote to substantiate his claim that, in the course of the nineteenth century, Europe ceased to be the spatial centre of international law, something that he clearly considered a negative evolution. C. Schmitt (translated and annotated by G. L. Ulmen), *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (Telos Publishing Press, 2006), 232.

[81] 'The conventional wisdom maintains that an explicit standard of "civilization" dates back to 1856, to the time when the Ottoman Empire is traditionally assumed to have been formally admitted as a "civilized" member of European society.' Gong (*supra* note 3), 31.

[82] See Section 2:1 'Japan's successful encounter with extraterritoriality: 1858-1899' of the present thesis.

[83] Gong (*supra* note 4), 50.

contradictions, and of course occasional manipulation by powerful states, the concept had a relatively stable and clear content. It is argued here that Gong's five criteria[84] adequately summarise this content. Hence, it is difficult to agree with Koskenniemi that 'civilisation' never acquired a settled content and that was its greatest advantage, since it was stretched to justify opportunistic political calculations of the West.[85] The concept of civilisation was indeed a creation of Western legal thought and diplomatic practice, but it had numerous political and legal implications which were not always under the control of the West.

Secondly, this thesis challenges the common argument that the standard of civilisation was basically the expression of cultural differences between Europe and the rest of the world. Anghie is probably the scholar who articulated this point most clearly: 'But positivist jurisprudence had to plausibly establish that cultural difference translated into legal difference,'[86] but, as was mentioned above, Gong and Koskenniemi also flirted with explanations based on cultural difference and perceived cultural superiority.[87] Here it is essential to admit a difficulty: it is extremely challenging to contest an argument if its basic premises are not properly explained. In other words, none of these scholars, and especially Anghie, explains what the content of this perceived cultural difference was and, consequently, their approach is very difficult to deconstruct. However, contract law in its most general form or the existence of a national army and a domestic police force can hardly be said to be part of what people instinctively understand as 'culture'. Further, in the course of the nineteenth century, it became obvious that religion was not the ultimate criterion for 'civilisation', which in turn excludes a major cultural factor from being a determinant of 'civilised' status. Fidler reaches a similar conclusion when arguing that, '[w]hether a country was civilized was more a question of the adoption of Westphalian mechanics than the acceptance of Western culture. The expansion of Western power in the nineteenth century saw Western civilization expanding in the more limited form of Westphalian civilization.'[88]

Finally, the fact that the concept was first used in relation to slavery around 1815 challenges Mieville's assertion that the concept only arose towards the end of the century to rationalise the practice of unequal treaties. More fundamentally, Mieville's argument solely takes into account the conclusion of the unequal treaties and not their termination. Therefore, his analysis does not acknowledge that achievability was integral to the standard and that the matrix of progression discourses from which it arose came with the promise (or threat) of social transformation, which in

[84] See note 38 above.

[85] This argument will also become clearer in the next chapter, where it will be shown that non-Western powers would in fact mobilise the concept themselves to put an end to extraterritorial rights of Western citizens.

[86] Anghie (*supra* note 6), 56.

[87] See notes 40 and 44 above.

[88] D. P. Fidler, 'The Return of the Standard of Civilization' (2001) 2 Chicago Journal of International Law 142, 144.

turn would render these societies sovereign. In a nutshell, the argument that the concept arose from the need to explain two-tier sovereignty of the time does not account for the fact that eventually it was through this concept that more and more political communities achieved sovereign status and terminated unequal treaties. Thus, Miéville (along with Koskenniemi on that point) overstates the role of the standard of civilisation as a means of political or economic domination and underestimates its function as a means of political and economic transformation.

To sum up, scholarly engagement with civilisation has focused on three different conceptualisations and critiques. A first strand is the conceptualisation of 'civilisation' as a method of managing cultural differentiation in a hierarchical manner, which is paramount for the work of Anghie and can also be found in a less systematised form in the works of Gong and Koskenniemi. Koskenniemi's point, though, is interlinked with, and partly negated by, his argument about the radical indeterminacy of the concept as a primary method for the political subjugation of the colonies. Thirdly, Miéville offers a different explanation, arguing that the concept was a *post factum* rationalisation of the specific practice of unequal treaties with the so-called semi-civilised states. However, the historical lineage of the concept and the way international lawyers of the time set out the criteria for 'civilised' status do not support the view that the concept was about 'culture', a fairly abstract concept in any event. Rather, analysis of both theory and practice of the time reveals that the concept had a specific, if not altogether fixed, content, including state centralisation, guarantees for basic rights, adherence to international law, and the abolition of slavery. In this sense, Miéville's attempt to construct an alternative to cultural explanations is a welcome point of departure. However, his scheme ignores the contradictory and dynamic function of the concept, which both enabled the periphery's exclusion from international law and engineered its conditional inclusion provided that socio-economic transformation towards market relations would take place. Given the diagnosed shortcomings of the available analyses, the next section will provide an alternative that focuses on the close conceptual and practical links between 'civilisation' and the diffusion, consolidation and legitimisation of capitalist relations of production across the globe.

1:4 A way forward: capitalism as civilisation

Thus far, this chapter has shown that the standard of civilisation was more about institutional change than about cultural difference and assimilation. This section will elaborate further on this premise. Through the standard of civilisation, international law became part of a wider process of social transformation that was taking place during that period. In a nutshell, a new reading of nineteenth-century international law is warranted, which re-evaluates the role of the discipline in healing the 'anti-capitalist cancer of the colonies'.[89] This thesis emanates from an observation made in passing by

[89] K. Marx, *Capital: A Critique of Political Economy* (Lawrence and Wishart, 1954) Volume I, 722.

Marx and Engels in the *Communist Manifesto*. Discussing the inherent tendency of capitalism for spatial expansion,[90] Marx and Engels argued that 'civilisation' was nothing but a proxy for capitalist societies of the time:

> The bourgeoisie, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian, nations into civilization. The cheap prices of its commodities are the heavy artillery with which it batters down all Chinese walls, with which it forces "the barbarians" intensely obstinate hatred of foreigners to capitulate. It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, i.e., to become bourgeois themselves. In one word, it creates a world after its own image.[91]

My own argument is that an analysis of the specific aspects of the standard of civilisation confirms the above aphorism and supports my argument that links the standard of civilisation with the global spread of capitalist relations that was taking place at the time.

1:4:1 Protecting individual rights and the rise of capitalism: the construction of the individual

Following Gong's criteria, we can conclude that the protection of certain fundamental rights was essential for a political community to be considered civilised. One obvious way to link this criterion with the CMP would be that the specific rights guaranteed, such as life, property, travel or freedom of commercial activity,[92] were directly related to commercial activities in the periphery, especially that of Western commercial capitalists. Indeed, the pre-conditions of 'civilisation' had little, if anything, to do with contemporary conceptions of 'human rights'. Rather, they provided for certain guarantees against arbitrary—but not necessarily against authoritarian—exercises of power, embodying the most traditional understanding of civil liberties. Put simply, for Western merchants to be able to operate in these regions it was essential that some guarantees would be provided for their personal safety, primarily for their property rights and for the operational character of contracts. Viewing this debate from a different angle, Craven makes a similar observation regarding the essential guarantees needed

[90] 'The bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country. […] In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations.' Marx and Engels (*supra* note 69), 223.

[91] Ibid., 224.

[92] 'The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners.' Schwarzenberger (*supra* note 43), 220.

for colonial trade to operate smoothly. Trying to find a way out of the (problematic) debate as to whether the Berlin Conference exclusively focused on facilitating colonial trade or led to the formalisation of colonialism,[93] Craven points out that, regardless of the conscious plans of political elites of the time, some degree of formalisation was essential in order for colonial trade to flourish. Protection of trade-related rights was one important aspect of this formalisation trend.[94]

This emphasis on rights was linked to the establishment of the capitalist mode of production in ways more complicated than directly facilitating commercial activity. In a nutshell, the existence of a specific form of legal, social and psychological subjectivity, individualism, is both a necessary precondition and an outcome of the function of capitalism. In this process of indvidualisation of the social body, it is principally the *form* of rights, as entitlements held by individuals, that is deeply rooted in the emergence and establishment of capitalist relations of power. As Douzinas has pointed out, 'the relationship between law and the subject is circular'.[95] On the one hand, it is almost self-evident that the legal guarantee of a right pre-supposes the existence of a subject to whom this right is guaranteed. On the other hand (and this is perhaps less obvious), 'a legal subject, whether a human being or an artificial entity (a company or association, the state or a municipality), exists if the law recognises its ability to bear rights and duties'.[96] A bodily monad, a person in the most neutral sense of the word, is not automatically an individual, in the sense of being a juridical and political subject. Rather, a series of social processes of interpellation and disciplining is required for persons to perceive themselves as individuals. One such technique was the legalisation of individual rights as part of the process of attaining 'civilised' status under international law.

Let us take a step back and offer some more general remarks about the then-rising capitalism, so as to understand the importance of rights protection in the context of the 'standard of civilisation'. As was argued in the Introduction of this thesis, the distinctive characteristic of direct producers in the context of the CMP is their radical separation of the means of production.[97] It is only in capitalism that direct producers are not legally or factually tied to the means of production or to other producers. In Poulantzas' words: '[t]hrough being totally dispossessed of the means of labour, the direct producer emerges as the "free" and "naked" worker, cut off from the network of personal, statutory, and

[93] 'My contention, in brief, is that the choice between reading the General Act as a success or a failure, or as a colonial or anti-colonial tract is largely a false one in that it fails to attend to the relationship between the apparent aspirations embodied in the text and the modalities for their realisation.' Craven (*supra* note 16), 35.

[94] 'In addition to the establishment of 'effective' jurisdiction and committing themselves to improving the conditions of the moral and material wellbeing of the native population and respecting acquired rights, they were also to assume primary responsibility for pursuit of the 'new' war on slavery' Ibid., 53.

[95] C. Douzinas, *The End of Human Rights* (Hart Publishing, 2000), 233.

[96] Ibid.

[97] See Introduction 'The capitalist mode of production: a very brief introduction' of this thesis.

territorial bonds that actually constituted him in medieval society'.[98] To elaborate on this statement, it is essential to keep in mind how, within feudalism, serfs were legally bound to their land and their master through a nexus of legal and ideological ties. These ties both restricted the movement and freedom of the serfs but also gave them claims against feudal lords. For these archaic social structures to be dissolved, people needed to stop perceiving themselves primarily as a part of their wider social group, religious community, village and so on, and needed to conceive themselves as nominally free and equal individuals. In turn, this individualisation of the social body is essential for the smooth reproduction of capitalism. To quote Marx: 'labour-power can appear upon the market as a commodity only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it as a commodity'.[99] In other words, it is through this formal separation of producers from each other and from the means of production that individualisation of the social body emerges. On a second level, these products of independent labour need to be circulated through contractual relations. This is the case since tributary relations that are of significance under feudalism are no longer operational under capitalism. Hence, a contract is the form through which this circulation takes place. Nonetheless, both for the above-sketched division of labour and for contracts to be operational and even conceivable, it is imperative that bodily monads perceive themselves as free and equal individuals who operate in conceptual isolation from each other and enjoy the freedom that enables them to sell their labour power without being legally bound to a feudal lord or a plot of land.

The specific way this individualisation takes place is historically contingent and differs across space and time.[100] That said, the protection of specific individual rights had been crucial in this process of individualisation of the social body, at least in Europe. Through the introduction of basic rights protections, the individual is elevated to the primary subject of domestic law. This is essential for the dissolution of archaic social structures that elevate patriarchal families or the community—that also constituted primary productive units—into primary legal subjects. Through individual rights guarantees, protection from power is guaranteed on an individual level. It is no longer families or serfs working on a plot of land who enjoy certain privileges and claims against power, but individuals. As we noted already, this individualisation is derivative of the social division of labour and of contractual relations. In turn, for contractual relations to be conceivable, and for this social division of labour to appear natural and acceptable, the social body needs to perceive itself as an ensemble of nominally autonomous individuals. Thus, rights protection was one of the possible techniques to achieve this crucial individualisation and sustain the diffusion—and then reproduction—of capitalist

[98] N. Poulantzas, *State, Power Socialism* (Verso, 2000), 64.

[99] Marx (*supra* note 89), 165.

[100] 'Of course, this structure of the relations of production and the labour process does not directly institute the precise forms of individualization assumed by the divided social body. It rather induces a material frame of reference.' Poulantzas (*supra* note 98), 64.

relations of production. Foucault captured this complicated relationship when he noted that the individual is not simply oppressed or protected by and against the state, but is a product of state power.[101] Protection of individual rights was one of the techniques for 'producing' individuals and hence its centrality for the concept of civilisation.

1:4:2 Constructing the Leviathan: modern nation-state as civilisation

In Gong's classification, at least three of the 'civilisation' criteria were directly related to what later came to be known as 'state-building'. First, for a political community to be 'civilised', it was essential to have a centralised, bureaucratic structure, leaving behind the loose administrative structure of mediaeval empires. Secondly, the monopolisation of violence was an essential step in this direction. Thirdly, the legalisation of both domestic and international affairs was considered a distinctive characteristic of 'civilisation'. Indeed, what we commonly understand as modern statehood, involving a centrally-organised, bureaucratic state apparatus and enjoying a monopoly of legitimate violence and control over both territory and population, was at the heart of the standard of civilisation. For example, Westlake considered state-building essential for the termination of colonialism: '[i]f any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out'.[102] Turning to state practice, state centralisation, disarmament and the weakening of local warlords was deemed essential for China's transition to fully 'civilised' status and to abolish extraterritoriality. Amongst other justifications, this was deemed essential to secure China's adherence to international law: 'China's immense interior necessitated the co-operation of the Chinese government in applying pressure on the provincial and local authorities to abide by treaty provisions such as permitting trade and missionary work.'[103] In this respect, the standard of civilisation was linked to the broader function of international law in promoting and consolidating state centralisation and more specifically the state monopoly over legitimate violence. We are here confronted with what Frédéric Mégret understands as the 'specific statism' of international law, which 'well participated in a dogma the consequences of which is to delimit the possibilities of imagining judicial forms other than the state'.[104] In the same way that Afghanistan or Somalia committed the gravest state crimes of

[101] 'The individual is not, in other words, power's opposite number; the individual is one of power's first effects.' M. Foucault, *Society Must be Defended* (Penguin Books, 2003), 30; 'And the doubt must remain that the abstract subject celebrated as the carrier of universal human rights is but a fabrication of the disciplinary techniques of Western "governmentality" whose only reality lies in the imposition on social relations of a particular structure of domination.' Koskenniemi (*supra* note 1), 514-15.

[102] Westlake (*supra* note 24), 143.

[103] Gong (*supra* note 4), 155.

[104] F. Mégret, 'L' étatisme spécifique de droit international' (2011-2012) Revue québécoise de droit international 105, 107 (original in French, translation my own).

allowing their monopoly over legitimate violence to be eroded and hijacked by terrorists and pirates,[105] nineteenth-century fading empires and pre-modern political communities were exiled from the realm of international law due to their 'weak' structure, which did not conform with modern statehood.

Admittedly, the nexus between modern statehood and the CMP is a dense and complicated one.[106] This contribution does not aspire to provide an exhaustive account of this relation. Nonetheless, it is argued that the existence of a centralised state apparatus was integral in the process of the dissolution of feudal and other archaic modes of production and the emergence and smooth reproduction of the CMP. Moving away from what Althusser characterised as the 'spatial metaphor'[107] of the classical Marxian scheme of infrastructure (the economic base) and superstructure (law and the State, ideology, religion, art, etc),[108] this thesis rests upon the premise that law and the state do not simply reflect the relations of production or the commodity-owner paradigm,[109] but are constitutive of them. In this instance, the existence of a centralised, bureaucratic state which is relatively separate from society and enjoys a monopoly over the legitimate use of force is intrinsic in the process of reproduction of the social relations of production. In turn, the existence of such a state was essential for the uniform application of laws necessary for the harmonious reproduction of the capitalist relations of production. As Heinrich notes: 'the state must be a discrete, *independent* force, since it has to compel *all* members of the society to recognize one another as private owners'.[110] This separation should not, however, be understood as a radical disassociation between the state and social struggles, but rather as the specific modality of the state's 'presence in the constitution and reproduction of the relations of production'.[111] The origin of this separation is the de-personalisation of economic domination in the context of the CMP. Direct producers are not directly subject to the owners of the means of production, unlike the

[105] 'Inversement, il n'est sans doute pas plus grand crime pour l' État, dans une perspective classique que de se laisser déposséder de son monopole de la violence légitime par des acteurs non-étatiques comme ce fut le cas de l'Afghanistan des Talibans ou aujourd'hui de la Somalie des pirates, ou encore de tel ou tel État ayant permis à certains de ses ressortissants de s'en prendre a des intérêts étrangers.' Ibid., 109.

[106] Amongst many: Maier (*supra* note 8); Poulantzas (*supra* note 96); C. Tilly, *Coercion, Capital and European State AD 990-1992* (Blackwell, 1992).

[107] L. Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)' in L. Althusser, *Lenin and Philosophy and Other Essays* (NLB, 1971), 130.

[108] See generally: K. Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers, 1977).

[109] The primary example here is Pashukanis' work: E. B. Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers, 2001). For the most comprehensive application of Pashukanis' theory in international law, see: Miéville (*supra* note 7).

[110] M. Heinrich, *An Introduction to the Three Volumes of Karl Marx's Capital* (Monthly Review Press, 2012), 204 (emphasis in original).

[111] Poulantzas (*supra* note 98), 7.

personal bonds between the serfs and the princes or the slaves and their masters. Economic domination takes place in the seemingly neutral place of the market, where agents encounter each other as free and equal subjects selling commodities. Therefore, political and economic domination are *analytically* distinct in capitalism, even though in practice it is representatives of the upper classes who occupy the crucial political positions. For this distinction to emerge, it was necessary that feudal or even tribal forms of political organisation that were based on personal status and religious belief had to be dissolved and the impersonal, bureaucratic state was one of the possible competitors to replace them, and in any case the model of capitalist political organisation available at the time. Therefore, the requirement of the centralisation, bureaucratisation and monopolisation of legitimate violence of the standard of civilisation was not simply an arbitrary preference for a 'Western' model of political community. Much more fundamentally, these requirements were aiming towards the creation of such state structures capable of sustaining capitalist relations of production.

1:4:3 Abolition of slavery and free labour: *vogelfrei* labourers as civilisation

The abolition of slavery was another principal condition for achieving 'civilised' status. Indeed, it was in reference to combating the slave trade that the term was probably used for the first time in the context of international law. From the last quarter of the eighteenth century, abolitionist movements across the Atlantic, and particularly in Britain, started gaining momentum.[112] Pursuant to an initiative of Lord Castlereagh, the Congress of Vienna issued a Declaration on the Abolition of the Slave Trade. The Declaration was incorporated into the General Act of the Congress, thus acquiring the character of an international law rule. Admittedly, the Declaration was of a general, programmatic character and did not lay down very specific obligations. Nevertheless, it stated that 'the public voice, in all civilised countries, calls aloud for slavery's prompt suppression'.[113] However, the international legal (im)permissibility of slavery remained unsettled under international law. Ten years after Vienna, Chief Justice John Marshall ruled that the slave trade was not against the 'law of nations' and did not amount to piracy.[114] Gradually, the problem was transformed into one of a conflict of laws and the prevailing view was that 'no state or nation was required, on theories of international law or comity, to give force to slave status created in another jurisdiction'.[115] Simultaneously, Britain negotiated numerous bilateral treaties that allowed for mutual ship searches in order to suppress the slave

[112] 'Launched in 1787, the first campaign against the British slave trade evolved to amass more popular support than any other British reform movement for the next half a century.' S. Drescher and P. Finkelman, 'Slavery' in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012), 901.

[113] Grewe (*supra* note 11), 554.

[114] *The Antelope* 23 US 66, 10 Wheat 66 (1825).

[115] Drescher and Finkelman (*supra* note 112), 901.

trade.[116] The Berlin Conference (1884-85) also paid attention to the question of the slave trade. The American delegate, Kasson, concisely summarised the reasons dictating the abolition of the slave trade as follows: 'it is not sufficient for all our merchants to enjoy equally the right of buying the oil, gums and ivory of the natives... Productive labour must be seriously encouraged in the African territories, and the means of the inhabitants of acquiring the products of civilized nations be thus increased.'[117]

Crucially, struggle for the abolition of slavery was one of the first and most prominent humanitarian campaigns of the nineteenth century. Its deep social roots still capture the imagination of lawyers and humanitarians alike.[118] The social and economic origins of this new humanitarian sensitivity were intensely debated in twentieth-century historiography, and what came to be known as the 'Haskell debate' is a good example thereof.[119] The question why humanitarian sensibility was specifically triggered by slavery and not, for example, by the appalling living conditions of the emerging working class of the time is of direct relevance here as well. Drawing from the rich Marxist historiography on the topic, the abolition of slavery is understood here as an essential pre-condition for the development and smooth reproduction of capitalist relations of production through the promotion of wage labour.[120] Craven puts forward a similar point:

> the concern for the problem of "slavery" or for the well-being of the native populations [was] being driven, neither by a purely humanitarian idealism, nor by a cynical desire to justify colonial intervention, but by the underlying logic of producing free labour as the generative condition for the market economy.[121]

Indeed, the existence of labourers who are deprived of access to the means of production and therefore can only survive by selling their labour power is at the heart of CMP. Marx described this freedom under capitalism as '*vogelfrei'* ('free as a bird'), when labourers' only choice was to sell their

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[116] Ibid.

[117] Berlin General Act, Annex 14, Protocol 5 in R. Gavin and J. Betley (eds), *The Scramble for Africa: Documents on the Berlin Conference and Related Subjects 1884/1885* (Ibadan University Press, 1973), 220.

[118] Amongst many: S. Moyn, 'Of Deserts and Promised Lands: On International Courts' in *Human Rights and the Uses of History* (Verso, 2014).

[119] T. Bender (ed.), *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (University of California Press, 1992).

[120] 'These examples highlight the importance of wages as a symbol of exchange and thus of voluntarism even in a situation of nearly absolute subordination. For antislavery advocates like Millar and Maconachie it was not the slave's subordination or lack of mobility that ran counter to nature. It was rather the lack of any token of exchange which would make the worker responsible, at least theoretically, for his own destiny.' D. B. Davis, *The Problem of Slavery in the Age of Revolution 1770-1923* (Cornell University Press, 1975), 492.

[121] M. Craven, 'Colonialism and Domination' in Fassbender and Peters (*supra* note 20), 886.

labour power or starve to death.[122] Hence, the perpetuation of slavery outside Europe was an impediment to these regions' transition to capitalism.

This observation about the contradictory relationship between imperialism and slavery brings us to an interim conclusion about the function of international law, imperialism and free-market economy. As has already been hinted, slavery had been an integral part of the colonial enterprise despite Miéville's opposing claim,[123] and it is difficult to conclude that, by the nineteenth century, it was altogether unprofitable. Moreover, though the argument that the struggle against the slave trade reinforced Britain's naval supremacy[124] is undeniably correct, it fails to address the heart of the question. It is argued that the essential question here is how and why the anti-slavery movement acquired enough moral force to allow the powers that invoked it to reinforce their naval supremacy or to categorise political communities in relation to their stance towards slavery. The response that has been offered by a significant part of Marxist historiography is that, without questioning the conscious motives of those combating the slave trade and slavery,[125] the fact that they more or less ignored the very real plight of freed slaves or of the working class of the time suggests that the drive was more complicated than pure humanitarianism. The answer provided here is that the abolition of slavery was intrinsically linked to the rise of capitalism on a global scale, being a necessary precondition of it. If we accept this line of argument, we could start drawing more general conclusions about both the specific function of the concept of civilization at the time and about international law more broadly. Even if a fraction of colonialists and Western powers benefited from slavery, its maintenance undermined the long-term sustainability of capitalism. Thus, the centrality of the abolition of slavery in international law of the time, including its importance for achieving 'civilised' status, indicates the crucial role of international law in safeguarding the long-term, generic interests of capitalism, even at the expense of individual capitalist states or fractions of capital.

Conclusion

It is probably an understatement that the vast majority of nineteenth-century international lawyers were no radicals. Their political commitments were associated with reformist liberalism and they even

[122] Marx (*supra* note 99), 689.

[123] Miéville (*supra* note 7), 248.

[124] 'That the British Empire proved open to humanitarian voices at home was not so much a case of power bending to morality as of morality bending to power. Humanity provided the warrant for what one observer acidly called "war in disguise", when in an age of rival empires the policing of the seas was crucial.' Moyn (*supra* note 114), 57.

[125] 'It is important theoretically to decide whether the abolitionists' understanding of their own ideas was definite or not. If it is, historians must speedily resurrect the Whig view. But if it is not, we are entitled to ask Davis's question again: why were abolitionists selective in their concerns?' J. Ashwirth, 'The Relationship between Capitalism and Humanitarianism' (1985) 92 American Historical Review 813, 816.

'waged a defensive war against the socialists and communists of the left'.[126] This defence and promotion of the capitalist *status quo* against anti-capitalists and pre-capitalist modes of production ran deeper than the individual preferences of specific lawyers. Rather, the political commitments of the 'founding fathers' of the discipline were symptomatic of its deeper biases. The systematic privileging of the capitalist mode of production and of the institutions needed for its reproduction as the sole legitimate forms of social and political organisation in the nineteenth century was one of these disciplinary biases. The standard of civilisation, which dominated the field for almost a century, is but one example of this close link. Having challenged earlier historiographical understandings of the concept, I have shown that the concept exhibited a relatively stable meaning, which was much more institutional and political than purely cultural. In a nutshell, for a political community to be deemed 'civilised' and therefore admitted to the society of civilised states, it needed to develop the institutions and legal norms essential for the development and reproduction of the capitalist mode of production. State centralisation, safeguarding some basic individual rights and the abolition of slavery formed the backbone of the standard, and at the same time constitute necessary preconditions for the smooth function of a market society. In turn, this observation has a number of implications, both for international law and for the way we conceptualise capitalism. For international law, arguments about the supposed neutrality of the field *vis-à-vis* states' socio-economic systems are fundamentally destabilised. Even though the rise of states claiming not to be capitalist in the course of the twentieth century challenged the discipline profoundly, the nineteenth century indicates a deep historical synergy between international law and capitalism. This synergy also challenges the perceptions of certain strands of Marxism that treat (international) law as a mere reflection of the realities of capitalism that supposedly exist outside law. The unattainability of both positions will become even clearer in the next chapter, which discusses the 'real life' of the standard of civilisation in the context of extraterritoriality in Japan and the Ottoman Empire.

[126] Koskenniemi (*supra* note 1), 67.

Chapter 2: Extraterritoriality and the civilising mission: international law and social transformation in Japan and the Ottoman Empire

All that is solid melts into air, all that is holy is profaned.

K. Marx and F. Engels, The Communist Manifesto

In Chapter 1, I argued that the standard of 'civilisation', a concept which largely dominated nineteenth-century international law, can be better understood if linked to the advancement of capitalist relations of production on a global level, which characterised the period. In essence, the criteria a political community had to fulfil in order to be considered 'civilised' were preconditions for the establishment and smooth reproduction of the capitalist mode of production (CMP). To verify this claim, I turn to international legal practice of the time and, more specifically, I focus on the practice of extraterritoriality and its specific application in Japan and the Ottoman Empire.

The official justification for the imposition of extraterritoriality lay with the allegedly insufficiently civilised character of these countries' social, political and institutional life. Hence, the examination of the conditions of imposition, function and abolition of extraterritoriality enables us not only to understand this specific practice, but also to grasp the socio-legal functions of the 'standard of civilisation'.[1] More specifically, this practice was not simply positive discrimination in favour of Westerners.[2] Rather, extraterritoriality should be understood as a means of exerting pressure towards these 'semi-civilised' societies to reform their legal, administrative and political systems. These countries were expected to develop a centralised bureaucratic mechanism, to claim and secure the legitimate monopoly to violence, demarcate their territory, legalise their interaction with the 'exterior' and, finally, to systematise their legal order by abolishing status-based law and promoting a legal system centred around the individual as a free, autonomous and self-reliant element. Furthermore, these reforms were neither part of a neutral process of 'modernisation' nor a form of cultural expansionism on behalf of certain Western states overconfident of the excellence of their legal

[1] See Chapter 1 'Decoding 'civilisation': 19th-century international law and capitalist expansion' of this thesis. For the original three-fold classification see: J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 vols (William Blackwood & Sons 1883-84) Also: G. W. Gong, *The Standard of "Civilization" in International Society* (Clarendon Press, 1984); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001). For the status of 'semi-civilised' states see: U. Özsu, 'From the "Semi-Civilized State" to the "Emerging Market": Remarks on the International Legal History of the Semi-Periphery' in U. Mattei and J. D. Haskell (eds.) *Political Economy and Law: A Handbook of Contemporary Research, Theory and Practice* (Edward Elgar, 2015).

[2] *Contra*: L. Chen, 'Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter' (2011) 13 Journal of the History of International Law 75.

system.[3] Rather, these reforms were essential in order for these countries to dissolve the archaic relations of production and move towards a free-market, capitalist paradigm.

This chapter is structured as follows: to begin with, extraterritoriality will be briefly explained and contextualised. Moreover, two sets of methodological comments will be provided. First, it will be shown that extraterritoriality was understood as a typical instance of the 'civilising mission' at the time. This centrality enables us to draw broader conclusions about the social function of the 'standard of civilisation' through examining extraterritoriality. Secondly, the choice of the specific case studies, Japan and the Ottoman Empire, will be explained: these provide two diverse historical settings and therefore allow for the drawing of more general conclusions. In the second part, a detailed historical account of the evolution of extraterritoriality in Japan and the Ottoman Empire will be provided. Finally, I will argue that, regardless of the conscious intentions of its designers, extraterritoriality was a mechanism of social engineering that enabled the transformation of feudal empires into centralised nation-states with growing capitalist bases. Therefore, both the theory and practice of the standard of 'civilisation' need to be understood in reference to the expansion of capitalist relations outside Europe at the time.

2:1 Extraterritoriality as the 'crown jewel' of the civilising mission

Extraterritoriality during the nineteenth century constituted a legal arrangement between Western and non-Western polities that excluded the citizens of the former from the territorial jurisdiction of the latter.[4] As numerous scholars have pointed out, this was a standard practice during the mediaeval period, when it was one's personal status that determined which set of laws was applicable to them.[5]

[3] Legal imperialism and assimilationism are the underlying argument of Kayaolu's comprehensive study of the phenomenon: T. Kayaolu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and, China* (CUP, 2014).

[4] 'Extraterritoriality renders immune from the local jurisdiction the subjects of the states which enjoy the right.' G.W. Keeton, 'Extraterritoriality in International and Comparative Law' (1948) 72 Recueil des Cours 283, 309.

[5] 'Nevertheless, at this period, the prevailing system in the Mediterranean was that the trader took his law with him, and a little later, there are instances of reciprocal grants of extraterritoriality between and Arabs and Christians.' Ibid., 296; 'When, during his crusade, Richard the Lionheart ordered thieves and robbers to be hanged near Messina, nobody objected to the English King exercising his jurisdiction on Sicilian territory and applying the laws of England there. Mediaeval polities did not know the particular territoriality of the modern state with its sharply defined territory as both a closed legal area and an exclusive sphere of governmental competence.' W.G. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), 65; 'Thus, during the early stages of human development, authority did not necessarily imply territoriality, nor did it aim at achieving a cohesive unity. […] In this sense, elements such as common affiliation with a certain religious, social, cultural, gender, civilization or ethnical group played a primary role.' M. Tait Slys, *Exporting Legality: The Rise and*

In the course of the nineteenth century, extraterritoriality was in operation in a number of social settings, including colonies, protectorates and so-called 'semi-civilised' states such as Japan, China, the Ottoman Empire and Siam. This chapter will focus on the last category, as these 'semi-civilised' countries presented the most challenging situation for the diplomats and theorists of the time.[6] This was because, given that these countries were nominally independent, such extensive exceptions to their territorial jurisdiction were generally considered problematic and hence, exceptional and temporary.

Extraterritoriality only arose as a problem for international lawyers to the extent that it was imposed upon 'semi-civilised' states that were not subject to formal colonialism, but still were not considered to have equal standing in the international legal realm. Importantly, the precise nature and characteristics of these polities remained unclear in the contemporary literature. For example, Lorimer remained quite indecisive regarding the exact status of countries like Japan, China or the Ottoman Empire.[7] Hence, this categorisation fitted all those political communities that fell 'somewhere between two ideal-typical poles - that of the territorially and jurisdictionally European state […] and that of the "stateless" extra-European nation'.[8] For the legal orthodoxy of the time, this peculiar position bore a series of legal consequences. The point of departure was Lorimer's argument that their jurisdiction could and should be restrained and, therefore, Western states could extend the application of their domestic laws 'on grounds of humanity'.[9] Nevertheless, these countries' partial inclusion in the international legal order[10] meant that their consent was required for the establishment of such a system. Hence, extraterritoriality could be imposed only through treaties, unequal as these might have been: '[t]hese treaties were unequal in several senses: they were forced at gunpoint; they expressed

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Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China (Graduate Institute Publications, 2014), 7.

[6] For the purposes of this paper, the word 'state' signifies the modern state as standardised by the *Montevideo Convention*, whereas the word 'country' is used for other forms of pre-modern political communities. That said, well-established terminology that does otherwise (for example 'semi-civilised states') will be maintained.

[7] Lorimer used the terms 'barbarous', 'semi-barbarous', 'semi-civilised' but also 'savage' seemingly interchangeably to refer to them: J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities, 2 vols* (William Blackwood & Sons, 1883-84) 15, 217; J. Lorimer, *The Institutes of Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* (2nd edn, William Blackwood and Sons, 1880), 206.

[8] U. Özsu 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in F. Hoffmann and A. Orford (eds.), *The Oxford Handbook of the Theory of International Law* (OUP, 2016).

[9] Lorimer, *The Institutes of the Law of Nations* (*supra* note 7), Volume I, 217-218.

[10] 'Turkey joined the Red Cross movement in 1868, the first non-Christian state to do so, and also became a party to the 1899 Hague Convention. This was part and parcel of a complex, protracted process of appropriating European legal thought' Özsu (*supra* note 8), 127.

the economic and political interests of Britain and other powers; and key provisions, including extraterritoriality, were not reciprocal'.[11] Amongst other instances, the ruling of the mixed tribunal of Alexandria is telling. When confronted with the argument that, as a matter of principle, 'foreigners, when living in an Ottoman country, are to enjoy the privilege of absolute extraterritoriality and hence are freed from all subjection to the local laws and local sovereignty',[12] the tribunal ruled that the claim was manifestly exaggerated, since independent states enjoyed territorial sovereignty regardless of their participation or exclusion from Christendom.[13] The tribunal went on to assert that the bases for extraterritoriality were the capitulations. Capitulations could be interpreted narrowly or broadly depending on the context, but no blanket exception to local jurisdiction could be presumed independently from them: 'these immunities are veritable restrictions to the principle of sovereignty, the law of nations has hence assimilated them to the servitude of public law, servitudes, *juris gentium* whose application must be kept within the limits of the treaties or usages that have established'.[14]

Institutional requirements aside, the imposition of extraterritoriality *as such* was a given and it was expressly associated with the supposedly insufficiently 'civilised' character of these countries. The relationship between civilisation and extraterritoriality was such a close one that numerous scholars and diplomats saw a clear causal link between the two. Bowden unambiguously conceptualised extraterritoriality as an outcome of the distinction between civilised and un-civilised political communities: '[t]he clear-cut legal distinction between the civilized and uncivilized worlds and the unavoidable interactions between the two led to what became known as the unequal treaty system, or the system of capitulations and the right of extraterritoriality'.[15] Despite their marked theoretical differences, Grewe,[16] Anghie[17] and Gong[18] all agree that extraterritoriality was intrinsically linked to

[11] R. S. Horowitz 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century' (2005) 15 Journal of World History 445, 455. For a comprehensive analysis of the 'unequal treaties', see M. Craven 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic Journal of International Law 335.

[12] *Sursock Brothers v Egyptian Government*, reprinted in EA van Dyck, *The Capitulations of the Ottoman Empire since the Year 1150* (Government Printing Office, 1881), 178.

[13] Ibid.

[14] Ibid. Lawrence also clearly stated that, for subjects of Western states to be exempted for local law, '[i]t rests on special agreement, and not, like those we have been considering hitherto, on the common law of nations'. T.J. Lawrence, *Principles of International Law* (Cushing and Co, 1895), 229.

[15] B. Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (University of Chicago Press, 2009), 124.

[16] 'The principal, practical effect of the linkage of international law to the standards of civilisation was the system of "capitulations" or, in other words, the "unequal" treaties by which the civilised nations reserved a special jurisdiction ("consular jurisdiction") over their own nationals, whom they did not wish to have subjected to the legal order and justice system of a half-civilised or uncivilised country.' Grewe (*supra* note 5), 457.

the concept of civilisation. This consensus[19] is largely reflective of the attitudes of international lawyers of the time. For example, Westlake understood extraterritoriality to be a direct outcome of the interaction between different civilisations:

> Turkey and Persia, China, Japan, Siam and some other countries have civilisation differing from the European, and so far as they are not Mahometan from those of one another. The Europeans or Americans in them form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilisation.[20]

Similarly, Lawrence argued that extraterritoriality is essential, 'owing to the defective character of Oriental administration of justice and the dependent position assigned to Christians by the sacred code of Islam'.[21] Pasquale Fiore was also clear about the link between extraterritoriality and the standard of 'civilisation': '[i]n principle, Capitulations are derogatory to the local "common" law; they are based on the inferior state of civilisation of certain states in Africa, Asia and other barbarous regions'.[22]

On a related note, it was during the nineteenth century that an Orientalist discourse on the barbarity, cruelty and lawlessness of the Ottoman Empire emerged, in order to justify the stabilisation and expansion of Westerners' extraterritoriality rights. To provide but one example, Lord Cromer wrote:

> The rigidity of the Sacred Law has been at times slightly tempered by well-meaning and learned Moslems who have tortured their brain in devising sophisms to show that the legal principles and social system of the seventh century can, by some strained and intricate process of reasoning, be consistently and logically made to conform with the civilized practices of the twentieth century.[23]

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[17] 'Put another way, this test in effect suggested that the project of meeting the standard of civilisation consisted of generalising the standards embodied in the capitulation system which was specific to aliens, to the entire country.' A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005), 86.

[18] '[T]he imposition of extra-territorial requirements until a certain "minimum of efficiency in running the State machinery, modicum of independence of the judiciary from the executive, and adequate protection of the safety, life, liberty, dignity, and property of foreigners" could be guaranteed by the non-European countries themselves, seemed a practical solution to the everyday problems which unavoidably arose when different civilizations collided in their customs and traditions.' Gong (*supra* note 2), 14.

[19] See also: 'The core of the problem was the difference in civilisation between the foreign merchants and local inhabitants, and the close association of the Mohammedan religion with the laws which the local inhabitants followed.' Keeton (*supra* note 4), 295; D.P Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization' (2000) 35 Texas International Law Journal 387.

[20] J. Westlake, *Chapters on the Principles of International Law* (Elibron Classics, 1894), 102.

[21] Lawrence (*supra* note 14), 230.

[22] P. Fiore, *International Law Codified and its Legal Sanction or The Legal Organisation of the Society of States* (Baker, 1918), 362.

[23] E.B. Cromer, *Modern Egypt* (Macmillan, 1908) Volume II, 136.

This disapproval would escalate to moral panic whenever the abolition of the practice was discussed.[24] Similarly, the rationale for the imposition of extraterritoriality in Japan was that 'it was thought that [the Japanese] were not able to guarantee some basic rights, like life, dignity, property, travel, commerce and religion, to foreigners in their countries and were not even familiar with the obligations of modern international law, including the law of war';[25] in a nutshell, their legal and political system did not live up to the 'standard of civilisation'. Extraterritoriality was thus not only conceived as the inevitable consequence of certain polities' 'uncivilised' status, but it was also viewed as the most typical demonstration of the operation of the standard of civilisation.

As has already been mentioned, this chapter is structured around a comparative study between Japan and the Ottoman Empire. Admittedly, these were not the only 'semi-civilised' states submitted to the practice, as China and Siam were two other prominent examples.[26] The reason for this specific choice of case studies is that these two cases represent the application of extraterritoriality in widely diverging social, cultural, religious and geographical circumstances. To mention but a few dimensions, the Ottoman Empire was in close interaction with Europe for centuries, whereas Japan experienced centuries-long isolation even from its own neighbours. Moreover, Japan represents the single most successful (judged against intra-systemic standards) case of encounter with, and management of, extraterritoriality, while the Ottoman Empire was subject to the regime well into the twentieth century. Finally, the Ottomans were a multi-ethnic empire with a strong Islamic tradition, while Japan adhered to a (neo)Confucian philosophy. Therefore, if common trends can be detected despite these diverse historical contexts, it is at least plausible to draw general conclusions regarding the overall function of extraterritoriality.

2:2 Japan and the Ottoman Empire: in search of common trends

2:2:1 Japan's successful encounter with extraterritoriality: 1858-1899

[24] See: H. Morgenthau, *Ambassador Morgenthau's Story* (Gomidas Institute, 2000), 114-17.

[25] R.P. Anand, 'Family of "Civilized" States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation' (2003) 5 Journal of the History of International Law 1, 18.

[26] For the history of extraterritoriality in China, see: P. K. Cassel, *Grounds of Judgement; Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (OUP, 2012); G.W. Keeton, *The Development of Extraterritoriality in China* (Howard Fertig, 1969); E. P. Scully, *Bargaining the State from Afar: American Citizenship in the Treaty Port China 1844-1942* (Columbia University Press, 2001). For the development of the practice in Siam, see: F. B. Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22 American Journal of International Law 70; A. Iijima, 'The "International Court" System in the Colonial History of Siam' (2008) 5 Taiwan Journal of Southeast Asian Studies 31.

Both during the nineteenth century and today, Japan's encounter with extraterritoriality is commonly seen as a smooth and successful one, due to the relative brevity of its operation (1858-1899) and the impressively rapid reforms Japan undertook to safeguard its abolition. However, this process was more complicated than the hegemonic legal and political narrative of the time suggests. The argument proposed here is as follows: for Japan to acquire 'civilised' status and to abolish extraterritoriality, it needed to introduce the reforms linked to the 'standard of civilisation', such as state centralisation, monopoly of legitimate violence and legalisation of domestic and international affairs.[27] As has already been argued,[28] these preconditions were intrinsically linked to the diffusion and stabilisation of the CMP. Japan's rapid transition to 'civilisation' is largely attributable to the internal balance of social powers within Japanese society. When extraterritoriality was imposed in Japan, the CMP was already a rapidly developing force in the Japanese society, and the native bourgeoisie, albeit excluded from the political power, was largely dominant in the economic sphere. Hence, external pressure, both in the form of extraterritoriality and in the form of international commerce, facilitated and accelerated a process that was already well on track.

As early as 1573, the *daimyo* (local ruler) of *Omura* allowed the Dutch to exercise jurisdiction in the port, not only over their subjects but also over Japanese, in order to secure their beneficial presence in the area.[29] This admittedly was a highly exceptional case. However, in 1613, the *English East India Company* was granted the privilege/right to exercise jurisdiction over the English committing offences in Japan. The Dutch and the Spanish largely operated under a similar regime.[30] Thus, foreigners residing in Japan were subject to their own laws and jurisdiction (which was not necessarily a state jurisdiction), and there is no indication that this was considered somehow humiliating or problematic for the Japanese. Nevertheless, this system did not have the chance to evolve, as it did, for instance, in the Ottoman Empire. In 1638, Japan imposed a strict system of seclusion that not only in principle excluded the foreigners from residing in Japan, but also prohibited the Japanese from going abroad or even building ships capable of making long voyages.[31] The commonly accepted explanation for this practice was that aggressive Christian missionaries provoked unrest in Japanese society.

This generally correct explanation needs to be taken a step further. Maintenance of uniformity and strength of Japanese religion was much more than a purely cultural, let alone spiritual, issue. Japanese religious organisation was in fact essential for maintaining the tributary mode of production in place. This was due to the structure of the political and economic system in Japan in the years of the

[27] See Chapter 1 note 38 of this thesis.

[28] See Section 1:4 'A way forward: capitalism as civilisation' of this thesis.

[29] F.C. Jones, *Extraterritoriality in Japan* (Yale University Press, 1931), 6.

[30] Ibid.

[31] Anand (*supra* note 25), 8. A small number of Dutch merchants were allowed to reside in Nagasaki under strict conditions.

Tokugawa dynasty (1600-1868). Although real power rested with the military commander (*shogun*), the Emperor was formally the source of all power, being 'the decedent of gods and representative of a dynasty coeval with heaven and earth'.[32] It was he who delegated power to the *shogun* to deal with the everyday matters, although this process of delegation was a mere formality. This binary scheme of power was the backbone of the overall class structure of *Tokugawa* Japan. Beneath the *shogun* were the local rulers (*daimyo*) who received land in exchange for providing military services. Their number fluctuated but, just before the 1868 Restoration, there were 266 *daimyo*, and in essence they constituted 'a "state class" utilising centralised political apparatus to extract surpluses—as tax or labour services—from a peasantry it did not personally control'.[33] Further, the *samurai* (warriors) were paid in rice for their military services, even though many of them had never fought and largely constituted a parasitic class:

> In order to maintain internal stability, the Tokugawa rulers had deliberately separated the samurai from the means of production (land ownership), eliminating their fiscal and military autonomy. […] The power of the samurai class had becomealmost exclusively based on office-holding, and this monopoly was not immediately in danger because no other class had yet the experience, education, and, confidence to displace warriors in administration.[34]

Further there were the farmers who were bound to the *daimyo*, the artisans, and the merchants. Given that class relations were 'ritualized and formalized… to a very high degree',[35] the spiritual authority of the Emperor was essential to keep the system in place. Hence, rapid Christianisation of the population was a very real threat for the perpetuation of the tributary relations of power. Therefore, Japan's seclusion efforts were an attempt to preserve the power relations that had come under pressure. Nevertheless, relative isolation did not save the Japanese tributary system. Although such estimates are always risky, it is suggested that, by 1868, the vast bulk of the country's wealth was already concentrated in the hands of capitalists.[36] In any case, by the mid-nineteenth century, Japan was experiencing serious social and political tensions, since economic power largely laid in the hands of a class excluded from political power.

This tension was significantly accentuated after the forcible opening of Japan to the world in 1853. In Maier's words:

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[32] Jones (*supra* note 29), 8.

[33] J. C. Allinson and A. Anievas, 'The Uneven and Combined Development of the Meiji Restoration: A Passive Revolutionary Road to Capitalist Modernity' (2010) 34 Class and Capital 469, 476.

[34] Ibid., 478.

[35] J. Halliday, *A Political History of Japanese Capitalism* (Pantheon Books, 1975), 8.

[36] Halliday, quoting Ike, asserts that, just before the Restoration, some 15/16^{ths} of Japan's wealth were in the hands of the bourgeoisie: ibid., 6. See also: N. Ike, *The Beginnings of Political Democracy in Japan* (John Hopkins Press, 1950), 12-13.

> The early Tokugawa after 1600 had sought to escape from decades of anarchic civil strife and to fix a stable order of Japan, to freeze it into a pyramid of isolated and hierarchical Confucian peace and order. […] Even before Commodore Matthew Perry arrived with his black ships in 1853, the Japanese old regime faced fiscal difficulties and social unrest.[37]

The US, anxious about the British expansion in China, sent Commodore Perry with four warships to make Japan accept the presence of foreigners. The *shogun* could not ignore the military supremacy of the US and moved forward with the agreement, asking though for imperial authorisation. Hence, in 1854, the *shogun* and Perry signed the 'Treaty of Peace, Amity and Commerce' (Treaty of Kanagawa).[38]

The Kanagawa Treaty had unpredictable implications for the international standing of Japan. Technically, the concessions made by the Japanese were quite limited, opening two ports to US merchants (Shimoda and Hakodadi), but without providing for permanent residence of US citizens in Japan.[39] The Japanese were largely content with this arrangement, underestimating the importance of the most-favoured-nation clause that intended to secure for US citizens any right granted to other nations. Indeed, the following year (1855), Britain also rushed to sign a treaty with Japan (the Nagasaki Treaty), and in 1858 US signed a second, more comprehensive treaty with Japan that provided for extraterritorial jurisdiction.[40] Unsurprisingly, numerous States, such as the Netherlands, Russia, France, Portugal, Austria-Hungary, the then-independent Hawaii and Peru followed the example set by the US and Britain and signed treaties granting them extraterritorial jurisdiction over their subjects in Japan. It is a historical curiosity that the most comprehensive extraterritoriality provision was that between Japan and Austria-Hungary, which had minimal commercial interests in

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[37] C.S. Maier, *Leviathan 2.0: Inventing Modern Statehood* (Belknap Press of Harvard University Press, 2012), 69.

[38] Treaty of Kanagawa, USA-Japan, 31 March 1854, 11 General Records of the United States Government.

[39] 'The port of Simoda, in the principality of Idzu and the port of Hakodadi, in the principality of Matsmai are granted by the Japanese as ports for the reception for American ships, where they can be supplied with wood, water, provisions and coal, and other articles their necessities may require, as far as the Japanese have them. The time for opening the first named port is immediately on signing this treaty; the last named port is to be opened immediately after the same day in the ensuing Japanese year.' Article 2, ibid.

[40] 'Americans committing offenses against Japanese shall be tried in American Consular courts, and, when guilty, shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The Consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens; and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.' Article 6, Treaty of Amity and Commerce between the United States and Japan, USA-Japan, 29 July 1858, 9 US Department of State, Treaties and Other International Agreements of the United States of America, 1776-1949, 362-372.

the Far East.[41] Crucially, the operation of the most-favoured-nation clauses meant that all citizens of the Treaty Powers automatically enjoyed the rights granted to Austria-Hungary.[42]

Legal reform was at the heart of the *Meiji* reform project and was of central importance for the Treaty Powers, in order for them to consent to the abolition of extraterritoriality. After all, the question of legal reform was of paramount importance when the *Institut du droit international* consulted its members as to the desirability and possibility of termination of consular jurisdiction in the 'Orient'.[43] The *Tokugawa* legal system was in principle based on feudal jurisdiction, and the role of the-in any event, very thin-central power in prescribing and enforcing laws was very limited. Further, laws were in principle neither written nor publicly accessible and customary law was of central importance. Correspondingly, the degree of legalisation of everyday life was extremely low, leaving significant space for traditional practices, informal mediation, etc. Moreover, the separation of powers was unknown and courts were perceived as 'administrative offices with concurrent power to settle disputes'.[44] Legalisation was particularly thin, when it came to what is now understood as private law.[45] The nominally tributary structure of the economy was at the root of this, since it precluded individual ownership of the land and extensive commercial transactions, at least in theory. It is telling that, in the 1840s, the *shogunate* officials accused the Westerners of only being interested in 'the pursuit of profit, in contrast with a society intent on rites and rituals'.[46] Since *Tokugawa* Japan aspired to be the latter, the place of private law, civil or commercial, was understandably extremely limited. Importantly, law reflected and perpetuated the strict class structure of the society, as status-based law was the backbone of *Tokugawa*'s law and administration.[47] To give but one example, a *samurai* was

[41] The provision read as follows: 'All questions in regard to rights, whether of property or of person, arising between Austro-Hungarian citizens residing in Japan, shall be subject to the jurisdiction of the Imperial and Royal authorities. In like manner, the Japanese shall not interfere in any question arising between Austro-Hungarian citizens and the subjects of any other Treaty Power. Austro-Hungarian citizens, who may commit any crime against Japanese subjects, or the subjects of any other nation, shall be brought before the Imperial and Royal Consular officers and punished according to the laws of their country.' Quoted in: Jones (*supra* note 29), 27.

[42] Amongst many: 'It is agreed, that if, at any future day, the government of Japan shall grant to any other nation or nations privileges and advantages which are not herein granted to the United States and the citizens thereof, that these same privileges and advantages shall be granted likewise to the United States and to the citizens thereof without any consultation or delay.' Article 9, Treaty of Kanagawa (*supra* note 38).

[43] 'Rapport de Sir Travers Twiss' (1881) Annuaire de l'Institut de droit international, 132.

[44] D. F. Henderson 'Law and Political Modernization in Japan' in R. E. Ward (ed.), *Political Development in Modern Japan* (Princeton University Press, 1968), 401.

[45] Kayaolu (*supra* note 3), 83.

[46] H. D. Harootunian, 'Late Tokugawa Culture and Thought' in M. B. Jansen (ed.), *The Emergence of Meiji Japan* (CUP, 1995) 125.

[47] Henderson (*supra* note 44), 394-395.

given the privilege to kill any commoner who addressed them in an inappropriate manner. Further, the family as a social and productive unit, and not the individual, tended to be the focal point of criminal legislation. As Jones reports, a husband could rightfully kill his wife and her lover in the case of adultery, and he was under an obligation to kill his wife if she offended his parents. What is more, a son who failed to assist his parents facing fatal danger was executed.[48]

The *Meiji* legal reform process can be divided into two periods: the earlier extending between 1868 and 1882, and the second covering the period between 1882 and 1898. In a nutshell, during the first period, reform focused on the reorganisation of the administration, while the second wave concerned legal codification. The reorganisation of the administration in accordance with the principle of legality meant that although law-making remained practically unrestrained, legal limits were imposed upon the administration to prevent secrecy and arbitrariness and enhance homogeneity and predictability in the way the state affairs were handled on a daily basis. Further, the old status-based law was gradually eroded to be replaced by a single legal status, that of the Japanese Imperial subject (*shimmin*).[49] For example, in December 1871, the *samurai* were 'liberated', since the law allowed them to engage in any occupation they wished, moving towards the abolition of the legal institutionalisation of class divisions.[50] Nevertheless, this process remained incomplete to the extent that hierarchical family relations were maintained during this period. Further, in 1882, a new Civil Code was promulgated, largely inspired by the French legal tradition.[51] This brought to an end the centuries-long influence of the Chinese legal system upon Japan.

However, when the future of extraterritoriality was examined at the Tokyo Conference in 1882, the process of legal reform was deemed incomplete. Harry Parkes, the British ambassador in Tokyo, objected to the abolition of the regime on four bases. First, the effective application of the new Criminal Code was still to be confirmed. Secondly, Japan lacked codified commercial and civil law. Thirdly, Japanese judges were not appropriately trained to implement the new legislation; and finally, more time was required in order to replace the judges of the old regime.[52] Japan's response to these criticisms was relatively quick and efficient. A process of drafting a constitution was initiated and the *Meiji* Constitution came into force in 1889.[53] Heavily drawing on the Prussian tradition, the

[48] Jones (*supra* note 29), 75-76.

[49] '[T]he Meiji rulers levelled the old status hierarch to one single *legal* (but not social) status-the Japanese imperial subject (*shimmin*).' Henderson (*supra* note 44), 416 (emphasis as in the original).

[50] Halliday (*supra* note 35), 24.

[51] Henderson (*supra* note 44), 419.

[52] FO 881/4938 (1883:166-170).

[53] *Constitution of the Empire of Japan* (Promulgation on the 11th of February 1889, entry into force 29 November 1890), available at: http://www.ndl.go.jp/constitution/e/etc/c02.html [last accessed 23 June 2016 DATE Month year].

Constitution stated that the Emperor was 'the head of the empire combining in himself the rights of sovereignty'[54] and granted him the right to exercise law-making powers through the Diet.[55] Rights were granted to the imperial subjects 'within the limits of the law' and the preamble of the Constitution read as follows: '[w]e now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law'.[56] Hence, the Constitution hailed Japanese subjects as individuals who enjoyed rights (and were not the beneficiaries of privileges), and individual property rights were singled out as worthy of the respect and protection of the Empire.[57] It is fair to assert that status-based law and its neglect or even hostility towards private transactions were brought to a definite end with the introduction of the Constitution. Further, courts were separated into public and private law branches following the civil law model and the independence of the judiciary was secured.[58] Publicity for trials was guaranteed[59] and the proper qualifications, tenure and discipline of the judges were subjected to the law.[60] Further, and despite controversies and delays to their introduction, three new private law codes (Commercial, Civil, and Civil Procedure) were made effective before the end of the century.

Legalisation of social affairs was not exclusive to the domestic sphere; international law also developed rapidly in Japan. The dismantlement of tributary relations[61] paved the way for the

[54] 'The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.' Article 4, ibid.

[55] 'Every law requires the consent of the Imperial Diet.' Article 37, ibid.

[56] Preamble, ibid.

[57] 'The right of property of every Japanese subject shall remain inviolate. (2) Measures necessary to be taken for the public benefit shall be any provided for by law.' Article 27 (*supra* note 52). The protection of the right to property was much broader than the protection of other fundamental rights, such as the freedom of religion: 'Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.' Article 28, ibid.

[58] 'The Judicature shall be exercised by the courts of law, according to law, in the name of the emperor' Article 57, ibid.

[59] 'Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear that, such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.' Article 59, ibid.

[60] 'The judges shall be appointed from among those who possess proper qualifications according to law. (2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment. (3) Rules for disciplinary punishment shall be determined by law.' Article 58, ibid.

[61] For the traditional position of Japan in the outer limits of the Sino-centric tributary system, see: Y. Onuma 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective' (2000) 2 Journal of the History of International Law 1, 11-18.

development of a new regulatory system of inter-community relations. These communities were now necessarily nation-states and international law was the system that organised their reciprocal rights and obligations. Further, in their efforts to open Japan, Western powers commonly employed the language of international law.[62] Initially, the Japanese were quite sceptical about international law, since their first encounter was through the system of unequal treaties. Still, they were determined to familiarise themselves with international law and, already in 1862, the Tokugawa government had sent eight students abroad to study it. By the end of the 1860s, parts of Wheaton's work were translated into Japanese.[63] Similarly, the Japanese Association of International Law was founded in 1897 and the *Japanese Journal of International Law* was published in 1902, two years before the *Revue générale de droit international public*. Undeniably, though, the most important incident in this process was the Sino-Japanese War in 1894, which, according to the Japanese, was conducted 'consistently with the law of nations'.[64] It is of particular interest that the leading international legal scholars, Professors John Westlake and Thomas Holland, advocated for the international legality and the civilised character of Japan's military efforts. This link was forged when Takahashi Sakaye, Professor of the Imperial Naval Staff College and advisor of the Japanese navy during the war between Japan and China, visited Cambridge University and published a book entitled *Cases on International Law during the Chino-Japanese War*, at Cambridge in 1899. Westlake and Holland contributed to the introduction and the preface of the book: '[t]hese were like testimonials by the two distinguished British international lawyers to certify that Japan had been faithfully following rules of international law in the Chino-Japanese war and their opinions that Japan was ready to join the family of civilized States'.[65]

As Kayolu observes, legal reform was in fact an important prerequisite for creating a unified administrative structure for Japan.[66] The *Meiji* regime reorganised the local administrative units,

[62] 'The first American Consul General in Japan, Townsend Harris, while negotiating the draft Treaty of Amity and Friendship with the commissioners of Shogunate, had started advising the Japanese to follow the rules of international law in their dealing with the Western countries and warned them about the grave consequences if they did not accept the tenets of this binding law of nations.' In: R.P. Anand, *Studies in International Law and History: An Asian Perspective* (Springer, 2004), 42-43.

[63] 'A Chinese translation of Henry Wheaton's *Elements of International Law* (Oxford, 1836) by a Christian Missionary W.A.P. Martin, had been published in 1864 in China on the orders of Prince Kung. The Chinese translation was reprinted in Japan in 1865 and was not only presented to the contemporary last Shogun, Tokugawa Yoshinobu, but was eagerly and enthusiastically read by the authorities and officials of the Tokugawa Government as well as keen intellectuals who held it in high esteem, almost "like holy scriptures". In 1868, a part of Wheaton's book was translated into Japanese.' Anand (*supra* note 25), 19.

[64] S. Takahashi, *Cases on International Law during the Chino-Japanese War* (Cambridge, 1899), 2.

[65] Anand (*supra* note 25), 28.

[66] Kayaolu (*supra* note 3), 81.

reducing the 250 *daimyo* down to 46 prefectures with a centralised and concrete administrative system that went down from the Emperor to the smallest village.[67] Significantly, prefectures were demilitarised, since they could now maintain only one platoon of troops to safeguard the public order.[68] In order to build national unity, a new education system was introduced by the 1872 Education Act, which was openly dedicated to enhancing people's loyalty to the state and the state's ability to mobilise its citizens.[69] Indeed, the state attempted to claim a central role in people's education, both by introducing compulsory education, and by excluding from certain official posts graduates of non-state education institutions, and importantly, of private law schools.[70] Further, conscription was a means employed to secure mass mobilisation and enhance people's 'patriotic' feelings. Hence, conscription was first introduced in an attempt to concentrate military forces in the hands of the central government. This was the reason that the government did not choose to employ the unemployed *samurai* that were 'liberated' by their formal bonds a year earlier (1871), but opted for a new system built on exclusive commitment towards the newly emerging nation-state. In 1876, the systematic attempt to concentrate violence at the hands of the state both factually and symbolically resulted in the government banning the practice of wearing swords, a traditional *samurai* practice that, amongst other things, made their status visible.[71]

This rapid and comprehensive transformation of Japanese law and society resulted in the relatively early abolition of extraterritoriality. In 1895, the Great Powers signed a treaty with Japan for the abolition of extraterritoriality. Four years later (1899), the treaty became effective, rendering Japan the first non-Western, non-Christian state to gain full sovereignty under international law. The argument proposed here is that the reasons for the relatively quick abolition of extraterritoriality can be traced in the comparatively easy and quick completion of the *Meiji* reforms programme between 1868 and 1900. In turn, this fact can be associated with and at least partly attributed to the internal balance of social powers in Japanese society. In short, when extraterritoriality was imposed in Japan, the capitalist mode of production was already a rapidly developing force in Japanese society and the

[67] See note 51 above.

[68] Halliday (*supra* note 35), 26.

[69] S. Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (Routledge, 2009), 129.

[70] Halliday (*supra* note 33), 38.

[71] This initiative was part of a distinctive trend of state monopolisation of legitimate violence and of factual superiority in coercive means that took place in Europe as well a few centuries earlier: 'Since the seventeenth century, nevertheless, rulers have managed to shift the balance decisively against both individual citizens and rival powerholders within their own state. They have made it criminal, unpopular, and impractical for most of their citizens to bear arms, have outlawed private armies, and have made it seem normal for armed agents of the state to confront unarmed civilians.' C. Tilly, *Coercion, Capital and European States A.D. 990-1992* (Blackwell, 1992), 69.

native bourgeoisie, albeit excluded from the political power, was largely dominant in the economic sphere. Hence, external pressure, both in the form of extraterritoriality and in the form of international commerce, facilitated and accelerated a process that was already well on track. It is asserted, therefore, that the reforms required for the abolition of extraterritoriality largely coincided with the demands of the rapidly rising Japanese capitalist class, and, hence, the success of the encounter.[72]

2:2:2 The Ottoman Empire: the slow emergence of sovereignty in the periphery of Europe

When it comes to extraterritoriality, the Ottoman Empire manifests certain particularities. Unlike the Japanese case, which involved varying degrees of isolation such that the problem of the legal treatment of aliens mainly arose in the course of the nineteenth century, the Ottoman Empire had been through centuries of interaction with Europe. Its geographical proximity to Europe and its vast territorial possessions in Europe, the existence of extensive trade relations between the two regions and the fact that significant Christian populations resided in the Empire, either as subjects of the Sultan or as merchants, posed the problem of the legal status of non-Muslim residents of the Empire quite early.

In fact, this close symbiosis was less problematic than we might imagine. Mediaeval Muslim legal and political thought and practice evolved around the binary scheme of *dar al-Islam* (the whole territory in which the law of Islam prevails) and *dar al-harb* (Land of War), which generally can be defined as everything outside *dar-al-Islam.* Since 'Muslim jurisdiction, and therefore *dar-al-Islam*, was coextensive with secure, non-oppressed Muslim inhabitation',[73] the scope of its application was personal, with only secondary territorial connotations. Given the tolerance towards the peoples of the Bible dictated by the Quran, non-Muslim populations were allowed to apply their own laws. Indeed, the degree of communal autonomy within the Empire was so extensive that religious communities were the *loci* of political and social self-identification.

The regulation of the legal status of Christians, who were not subjects of the Ottoman Empire, was structured around the so-called *capitulations*. Capitulations were edicts of the Sultan that were

[72] 'For over a century Marxist theory seemed to offer a plausible, if often contested, framework. Marxist-derived explanations tended to view the agents for change as exponents of a bourgeois or middle-class world that advocated economic development, market forces, and universal legal norms against the feudal and agrarian elites of the past. […] This is not a debate to be resolved in a brief historical chapter. Marxian analyses serve perhaps most usefully to reveal the similarity among radical transformative processes, but less persuasively as detailed explanations for their individual trajectories.' Maier (s*upra* note 37), 113. Maier's objection is one that needs to be taken seriously, but since the purpose of this chapter is to analyse general trends in the operation of extraterritoriality, Marxism's ability to explain these trends convincingly is invaluable.

[73] M. Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins Press, 1955), 46.

unilaterally granted to foreign powers, and regulated the protection of their subjects.[74] Importantly, the capitulations were neither formulated nor perceived as treaties and, henceforth, they did not give rise to rights and duties, but rather granted privileges. As Spagnolo pointed out,

> these documents, regulating trade in the empire and the juridical status of European merchants, were negotiated arrangements that deliberately fell short, however, of being formulated as treaties. At the height of Ottoman imperial power they were granted to foreign representatives in the language of sovereign dispensation.[75]

For example, in the preamble of one of these capitulations, the reigning sultan asserted that 'entreaties were acceded to, and these our high commands conceded'.[76] Importantly, the exception from Ottoman jurisdiction did not automatically result in the submission of the given foreigners to the state-law of their place of origin. For instance, in the case of British merchants residing in the Empire, it was not the British state, but rather the *Levant Company* that had jurisdiction over potential cases. Accordingly, the individuals who served as judges usually did not have extensive legal training, and thus resolved conflicts mainly through bargaining and compromise rather than by strictly applying legal rules. Impressively, this remnant of a mediaeval understanding of legality survived until 1825, when the Foreign Office took over extraterritorial authority by the *Levant Company*.[77]

Given this long-standing character of extraterritoriality in the Ottoman Empire, it is difficult to detect the exact point of time when extraterritoriality was transformed from a concession granted by a powerful sultan to a practice imposed by the West over a collapsing empire.[78] Indeed, there might not be a specific turning point, but it was rather an ongoing process extending into the first half of the nineteenth century. The situation was definitely blurred and complicated, but it is clear that, by 1856, extraterritoriality as a system imposed by the West had been crystallised.[79] This was also the point that extraterritoriality was redefined as a legal paradox, as a violation of sovereign equality and finally as a humiliation. What undeniably complicated the state of affairs was the 1856 Treaty of Paris. The

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[74] The first such arrangement was between the Ottoman Empire and France in 1535. England and the Dutch Republic received similar privileges in 1579, Austria in 1615, Russia in 1711, Sweden in 1737. P. M Brow, *Foreigners in Turkey: Their Juridical Status (*Princeton University Press, 1914), 41.

[75] J. P. Spagnolo, 'Portents of Empire in Britain's Ottoman Extraterritorial Jurisdiction' (1991) 27 Middle Eastern Studies 256, 261.

[76] Great Britain, Foreign Office, *British and Foreign State Papers*, 1812-1814, Volume I, 748.

[77] Ibid., 258.

[78] Keeton is also deliberately vague on this point: 'It was only many centuries later, when Turkey had acquired different notions of law and sovereignty from the Western nations subject to international law, that the existence of capitulations was resented.' Keeton (*supra* note 4), 296.

[79] 'Ottoman claims that the capitulations were unilateral privileges were contested by a large number of Western authorities, who grew increasingly fond of the argument that the capitulations, however anomalous, ought to be understood as treaties imposing binding legal obligations upon both parties.' Özsu (*supra* note 8), 129.

inclusion of the Ottoman Empire in the 'family of the civilised nations' was dictated arguably by the necessity to enhance the status of the Empire and protect it both from Russian expansionism and from internal secession tendencies. That said, it inevitably sharpened the contradictions of extraterritoriality. If the Empire was indeed a civilised state, such extensive exceptions from its jurisdiction violated its sovereignty, its territorial integrity and the absence of any sense of reciprocity challenged the formal equality of states. These were indeed the arguments put forward a good sixty years later, when the Ottoman Empire unsuccessfully attempted to abolish extraterritoriality in 1914.[80] Furthermore, the arrangement was increasingly seen as unusual, humiliating and detrimental to Ottoman interests. In 1886, Hakkı Paşa, who was one of the first Ottoman international lawyers and the author of a relevant textbook, criticised harshly the regime, echoing the growing indignation of Ottoman elites: 'In fact, one of the greatest calamities faced by Islam today is the privilege enjoyed by aliens [in the Ottoman realms], the intrusions by consuls; consequently, the favours accorded by our forefathers as a matter of grace and benevolence are used as weapons against us.'[81] Crucially, extraterritoriality began to be seen as a factor hindering the administrative reform of the Empire, since it perpetuated the co-existence of multiple legal systems in its territory.[82]

Eventually, the arrangement was abolished in 1923, with the conclusion of the Treaty of Lausanne.[83] It is important to assess what were the developments that contributed to this abolition, as this might be useful in order to better grasp the social function of the system. For instance, certain Turkish historians assert that it was the military strengthening of Turkey and its overwhelming victory against Greece that necessitated this evolution.[84] Further, the pertinence of the Turkish delegates and the

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[80] E. Augusti, 'From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire' (2011) 4 Journal of Civil Law Studies 302, 304.

[81] I. Hakkı Paşa, *Tarih-i Hukuk-ı Beyn-ed Düvel* (Karabet ve Kasbar Matbaası 1886), 37 quoted in B. Aral, 'The Ottoman "School" of International Law as Featured in Textbooks' (2016) 18 Journal of the History of International Law 70, 91.

[82] This was the main argument put forward by Alî Paşa in Paris: 'Les privilèges acquis, par les capitulations, aux Européens, nuisent à leur propre sécurité et au développement de leurs transactions, en limitant l'intervention de l'administration locale; que la juridiction, dont les agents étrangers couvrent leurs nationaux, constitue une multiplicité de gouvernements dans le gouvernement et, par conséquent, un obstacle infranchissable à toutes les améliorations.' Quoted in Augusti (*supra* note 80), 304.

[83] 'In Turkey the nationals of the other Contracting Powers, and reciprocally Turkish nationals in the territories of the said Powers, will have free access to the courts of the country, and may sue and be sued in the same conditions in all respects as nationals of the country, subject to the provisions of Article 18.' Article 14 Treaty of Peace with Turkey, Allies-Turkey (signed 24th July 1923, entered into force 6th August 1924) 28 UNTS 701.

[84] Turkish historiography argues that the nationalist victory under Mustafa Kemal (later Mustafa Kemal Atatürk) in 1922 against British-sponsored Greek forces caused the Allies to acquiesceto numerous Turkish demands, including the abolition of extraterritoriality.' In Kayaolu (*supra* note 3), 129.

reluctance of Europe to engage in a war with Turkey also contributed towards this outcome. Nevertheless, this might be illustrative of the very specific moment when extraterritoriality was abolished (and, say, not five years later), and not of the general trend towards its abolition.

The development of a centrally and bureaucratically organised nation-state, the modernisation and codification of the legal system and crucially, the dissolution of the remnants of the Asian mode of production were consistently perceived and presented as the preconditions for the abolition of extraterritoriality. By 1923, these goals were generally accomplished and, therefore, the continuation of the system was an anachronism attributed only to the particularistic interests of the Western states. Furthermore, it was exactly this centralisation and modernisation that transformed the 'Sick Man of Europe' into a considerable peripheral power. The victory against Greece in 1922, the exchange of populations between the two states countenanced by the PCIJ, and the ethnic cleansing of the Armenians enhanced the self-confidence of a specifically Turkish bourgeoisie that now felt that the emergence of a national capitalist class was possible and thus were determined to get rid of an international legal framework that put their interests in peril.

In one of the most comprehensive works about the phenomenon of extraterritoriality, Kayaolu asserts that 'Ottoman legal institutionalization is the centerpiece'[85] for understanding the purpose and function of the system. Hornby, a high-ranking British Foreign Office official responsible for the promotion of the reforms in the Empire, provocatively asserted that its whole legal system should be subjected to revision.[86] Even though being so outspoken cost him his post, his views largely reflected the views and the practice of the West. In the case of the Ottoman Empire, legal reform revolved around three main issues: codification, the abolition of religious law and the professionalisation of the judiciary. The codification process was mainly promoted by the 1839 Imperial Edict and the 1856 Reform Edict. In this context,

> a number of codes were enacted between 1839 and 1881. These included a criminal code (1858), a code of criminal procedure (1880), a commercial code (1850), regulations determining the procedure of the commercial courts (1860), a code of maritime law (1864) and a code of civil procedure (1881). French law exercised a preponderant influence in fashioning this new legislation, which was restricted to the technical aspects of law and did not touch upon subjects such as family law and succession, which fall within the sphere of civil law proper.[87]

Further, the prominence of religious law was a problem quite specific to the Ottoman Empire, in comparison to the other countries where the system of extraterritoriality was implemented. For instance, the Imperial Edict established state courts for the management of commercial and criminal cases, but civil cases still rested with the religious courts, be they Muslim, Christian or Jewish. Further, even when the codification advanced, it was understood that in case of conflict between

[85] Ibid., 114.

[86] Spagnolo (*supra* note 75), 272.

[87] H. V. Velidedeoolu, 'The Reception of the Swiss Civil Code in Turkey' in UNESCO, *The Reception of Foreign Law in Turkey* (International Social Science Bulletin, 1957), 61.

codified and religious law, the latter prevailed.[88] Henceforth, the secularisation of legality was one of the primary targets of the process that was gradually accomplished and, indeed, reached its apogee with the abolition of religious courts in 1924 and with the constitutionalisation of a strict separation between religion and the state. This secularisation of legal affairs was of paramount importance, to the extent that Twiss, writing as a rapporteur for the *Institut de droit international*, identified the Empire's Islamic world order as directly incompatible with reciprocity and equality, which were seen as basic concepts of 'civilised' international law.[89] Thirdly, the legal training and ethos of the judges was considered a pressing issue. Hornby, for example, identified 'lengthy bargaining that went against clear cut judgements'[90] as one of the principal problems of the judiciary. Similarly, the US State Department Report on the subject identified the existence of well-educated judges as one of five conditions for the abolition of the system.[91] The demand for the legal training of judges was in fact a demand for the creation of a distinct, professionalised class that was separated from the administration, but simultaneously faithful to the state. It is essential to note that the separation of powers went hand in hand with the centralisation and nationalisation (in the literal sense of the word) of the judicial system. Furthermore, this emphasis on the legal education of judges is symptomatic of the rise of law as a distinct technical discipline only accessible to certain individuals. As Poulantzas argued, '[m]odern law is a *state secret* which grounds a form of knowledge monopolized for reasons of State'.[92]

Administrative reform and state-building constituted essential conditions for the abolition of extraterritoriality. The existence of a centrally organised state that would guarantee property rights and the conditions for capitalist accumulation by force were high on the agenda of the reforms. At the end of the day, any legal reform would be futile without the mechanisms necessary to enforce its provisions: '[a]lthough law organizes this violence, there can be no law or right in such a society without an apparatus that compels its observance and ensures its efficacy or social existence: *the efficacy of law is never that of pure discourse, the spoken word, and the issuing of rules*'.[93]

It is notable that the emergence of such a modern nation-state was an endogenous process facilitated by international factors and not an externally imposed novelty, totally strange to the indigenous modalities and social needs. In the Ottoman Empire, this administrative re-organisation of the state

[88] Kayaolu (*supra* note 3), 116.

[89] 'The Quran of Mohammed, on the other hand, is not only a moral code, but also a code of international law, which prohibits relations of equality and reciprocity between the house of Islam and the countries of the infidels.' Twiss (*supra* note 43), 133 (original in French, translation my own).

[90] Spagnolo (*supra* note 75), 270.

[91] van Dyck (*supra* note 12), 40.

[92] N. Poulantzas, *State, Power, Socialism* (Verso, 2000), 90 (emphasis in original).

[93] Ibid., 85-86 (emphasis in original).

came to be known as *Tanzimat* and took place between 1839 and 1876. In the course of this period, a series of structural reforms took place, ranging from the issuing of banknotes and the creation of the first post office and telegraph network, to reforms that went to the heart of the mode of production, such as the prohibition of slavery and the slave trade and the replacement of guilds with factories.[94] It is telling of the rapid expansion of the centralised state that the number of civil servants boomed from approximately two thousand to 35,000 in the course of a few decades.[95] Furthermore, the interaction of the Empire with other states became professionalised, institutionalised and legalised. As a result, the Ministry for Foreign Affairs was founded in 1836. These reforms were closely associated with the rise of nationalists' sentiments and movements, with the Young Turks constituting a prominent case. These social factors 'not only enforced the territoriality of the law […] but they also territorialized the state, society and the individual'.[96] The dissolution of legal pluralism and administrative centralisation reshaped the social meaning of territory that gradually arose as the locus for the exercise of power was similarly transformed into secular-national power.

The emergence of a territorialised nation-state constituted the condition and the outcome of a process of dissolution of the feudal relations of production and of transition to capitalism. It is therefore interesting to examine how this process was linked with extraterritoriality in the Ottoman Empire. Nominally, the liberalisation of the economy did not constitute a condition for the abolishment of the system. Nevertheless, there is strong evidence that it lay in the heart of the process, the reform of Ottoman land law being a good example. In a nutshell, the Ottoman Empire constituted a typical example of the Asiatic mode of production (AMP). The main characteristics of the AMP were the following: a) absence of private property of the means of production; b) collective organisation of the ruling class in a despotic state; and c) collective organisation of the ruled-labouring class in (village) communities.[97] It was an economic model that relied heavily on agriculture and more specifically on schemes of communal ownership over land, and gave rise to a complicated system of personal bonds and dependencies that was ultimately reducible to the person of the Sultan. By the second half of the eighteenth century, this system became increasingly destabilised; a newly-emerging merchant bourgeoisie pushed forthe liberalisation of the economic model. Nevertheless, historical and social reasons hindered the dissolution of the traditional relations of production, even though the *Tanzimat* bureaucracy steadily promoted the establishment of a centralised state that would manage a growing

[94] For more, see: W. L. Cleveland and M. Bunton, *A History of the Modern Middle East* (5th edn, Westview Press, 2010).

[95] C. Findley, *Ottoman Civil Officialdom: A Social History* (Princeton University Press, 1989), 22-28.

[96] Spagnolo (*supra* note 75), 273.

[97] K. Shiozawa, 'Marx's View of Asian Society and His "Asiatic Mode of Production"' (1996) 4 Developing Economies 299.

capitalist economy.[98] Similarly, European states consistently pressed for the repeal of the rule that prohibited foreigners from buying land in the Empire.[99] This reform would of course facilitate the commercial ambitions of Western merchants. Simultaneously, though, it was an essential step for freeing the land from the pre-capitalist burdens. Permitting foreigners to own land was more than simply reversing a discriminatory practice. Essentially, it was about abolishing personal relations as the basis of land ownership and turning land into a commodity that could be sold and bought freely in the market. Two Land Codes were, therefore, introduced in 1858 and in 1867. They both sought the commercialisation and privatisation of land ownership, fundamentally altering the patterns of ownership throughout the Empire. Ruth Kark summarises this evolution as follows:

> The Laws led to a change in ownership of village lands, particularly in uninhabited regions. Thus, large tracts of State lands that were available for sale changed hands ("fluid inventory" of land). These lands were purchased for speculative purposes, or for land reclamation and establishment of modern, profitable cash crop farms. This often involved the introduction of new technologies and had a large-scale and long-term impact on the landscape.[100]

Crucially, the 1867 Land Code permitted foreigners to buy land in the Empire on the condition that the Ottoman courts would have full jurisdiction over the cases arising.[101] Undeniably, this was the result of bargaining and compromise between the Empire and European states. Still, this constitutes a strong indication that the exemption from Ottoman laws and jurisdiction only superficially was about 'civilisation standards' and cultural differentiation. When the Ottoman Empire showed itself to be willing and capable of acting as the guarantor of private ownership rights, as 'the ideal personification of the total national capital',[102] the *raison d'être* of extraterritoriality ceased to exist. Hence, long before the system was abolished, the privatisation of land set an important precedent and created a

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[98] 'Indeed, in the late eighteenth and nineteenth centuries, the Ottoman Empire embarked upon an ambitious reform programme, especially in military and bureaucratic affairs, with a view to reorganising the state. Ottoman reformers wanted to resuscitate the declining empire. They came to believe that it was necessary to reform the state in order to do so.' B. Aral, 'The Ottoman "School" of International Law as Featured in Textbooks' (2016) 18 Journal of the History of International Law 70, 76.

[99] As van Dyck reported, it was under the pressure of French capitalists in the Ottoman Empire that Marquis de Moustier, the French Minister of Foreign Affairs, demanded 'the free exercise for foreigners of the right to hold real estate'. van Dyck (*supra* note 12), 69.

[100] R. Kark, 'Consequences of the Ottoman Land Law: Agrarian and Privatization processes in Palestine, 1858-1918', available at: http://geography.huji.ac.il/.upload/RuthPub/143.pdf [last accessed 27 March 2016).

[101] 'The four year-long discussions (1863–1867) between the Ottoman Empire and Western states produced the Ottoman Land Code of 1867. The Land Code commercialized the Ottoman land system. The Ottoman government assumed absolute jurisdiction over commercial transactions of real property. The empire would apply the land code as well as land taxes equally to foreigners and Ottomans. The Ottoman government would enforce the land code uniformly in secular civil courts, not in religious courts.' Kayaolu (*supra* note 3), 128.

[102] F. Engels, *Socialism: Utopian and Scientific* (Cosimo Classics, 2008), 67.

discontinuity at the heart of the system. Given that this arrangement constituted an exception to an already exceptional system, it paved the way for the establishment of a new normality, which was characterised by the abolition of the practice altogether and the emergence of a centralised state capable of supporting a capitalist economy.

Indeed, it is hardly coincidental that the abolition of extraterritoriality in 1923 coincided with the succession of the Ottoman Empire by Turkey. By then, most of the reforms demanded were either accomplished or well on track. In the final analysis, and in the words of Kemal Ataturk himself, the objective of the new government was to tear up the very foundations of the old regime anyway.[103] More specifically, the arrangement was abolished in 1923 with the conclusion of the Treaty of Lausanne.[104] The argument put forward here is that the development of a centrally and bureaucratically organised nation-state, the modernisation and codification of the legal system and crucially, the dissolution of the remnants of the Asiatic mode of production were consistently perceived and presented as the preconditions for the abolition of extraterritoriality. By 1923, these goals were generally accomplished and, therefore, the continuation of the system was an anachronism attributed to the particularistic interests of the Western states. Accordingly, the military victory of Turkey was the catalyst, but not the structural cause, for the abolition of the regime.

2:3 Beyond culture: Constructing a materialist narrative of extraterritoriality

Drawing from the above historical examples, the argument put forward here is that through the concept of civilisation and more specifically through extraterritoriality, international law was a force of social engineering that enabled the transformation of certain societies in transition, such as Japan or the Ottoman Empire, into centralised nation-states with the institutions and legal systems necessary to support the diffusion and reproduction of the capitalist relations of production. In Chapter 1, I contested Miéville's assertion that the concept of civilisation was a *post-factum* rationalisation of the unequal treaties between the West and certain 'semi-civilised' countries.[105] I would like to return briefly to this point. Miéville's argument rests upon the presumption that '[t]he polities with which these imperialist unequal treaties were concluded-Siam, China, Japan, Zanzibar, Madagascar, Muskat and others - were territorially bounded and internally sovereign'.[106] Miéville is correct in identifying a

[103] 'It is our purpose to create completely new laws and thus to tear up the very foundations of the old regime.' Quoted in: B. Lewis, *The Emergence of Modern Turkey* (Oxford University Press, 1968), 275.

[104] It is noticeable that the Soviet Union had terminated Russia's unequal treaties with the Ottoman Empire two years earlier: 'The Soviet state broke completely and immediately with the colonial past of tsarism and repudiated all treaties of Tsarist Russia having a colonial, annexationist, unequal character.' G.I. Tunkin, *Theory of International Law* (George Allen and Unwin, 1974), 11.

[105] See Section 1:2 'Civilisation: what's in a name?' of the present thesis.

[106] C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006), 247.

close link between these treaties and the concept of civilisation. That said, the starting point of his analysis has—hopefully—been shown to be mistaken. Even though he does not elaborate on his understanding of sovereignty, his assertion that, around the mid-nineteenth century, these polities were sovereign and territorially bound is incorrect. Indeed, personal-status laws and loose administrative structures were still prevalent in Japan and in the Ottoman Empire well into the nineteenth century. In fact, it was the very function of extraterritoriality to transform these societies into 'sovereign and territorially-bound' states and, upon the success of this process, extraterritoriality became redundant and was abolished. The fact that these polities exhibited characteristics divergent from those of the modern nation-state was not purely historically and geographically contingent. Rather, these arrangements were linked to the feudal/Asiatic modes of production that were dominant in the mediaeval era and their gradual disintegration had not yet led to the establishment of the CMP. Thus, it is argued that Japan or the Ottoman Empire not only were not, but from a Marxian point of view, could not possibly be similar to the state structures in Western Europe, where the transition to capitalism had largely been completed by the nineteenth century.[107] Although this is part of a much broader discussion, Miéville's general disregard for the role of the state in the organisation of capitalism[108] is at the root of his misconception. Interestingly, this is a misconception shared by Anghie, who argues that '[t]his derogation from the sovereignty of the non-European state was naturally regarded as a massive humiliation by that state, which sought to terminate all capitulations at the earliest opportunity'.[109] Here, Anghie appears trapped in an anachronistic scheme, which assumes that all political communities valued territorially-bound power. This is far from being true.[110] There was nothing 'natural' in the sense of the humiliation extraterritoriality provoked during the last quarter of the nineteenth century. Rather, this discomfort was the outcome of the process of social transformation extraterritoriality was promoting. Since feudal political structures were dissolved and the territorially-bound nation-state emerged, wide exceptions to territorial jurisdiction became a curiosity and, indeed, a sign of inferiority. This was not the prevailing attitude during mediaeval

[107] This proposition draws from Poulantzas' (epistemological) observations about the impossibility of a general theory of the state. For Poulantzas, only a general theory of the *capitalist* (or the feudal, the archaic etc) state is possible. This is true to the extent that the specific way in which the state interacts with and constitutes the economy is singular for different modes of production. See generally: Poulantzas (*supra* note 92), 14-18.

[108] Miéville largely subscribes to Pashukanis' view that, since the modern legal form is allegedly inherently violent, the existence of a capitalist state that guarantees the function of commodity relations is contingent and not immanent: 'It is clear that Pashukanis sees overarching authority or any particular state form as contingent to the legal relationship inhering between two formally equal partners in the context of an exchange relationship. However, he goes further than this. For Pashukanis, law itself - in its earliest, embryonic form - is a product precisely of the *lack* of such an authority.' Miéville (*supra* note 106), 130 (emphasis in original).

[109] Anghie (*supra* note 17), 85.

[110] See note 6 above.

times, when law was not predominately territorial in the first place. Thus, both Miéville and Anghie appear to ignore the transformative impact of the practice and to focus on the (undeniable) element of Western domination over these 'semi-civilised' states.

My argument instead focuses on this transformative impact of international law and argues that it was at the heart of extraterritoriality. Twiss's report for the *Institut* supports this interpretation. Even though a certain degree of romanticisation of the practice and of the attitude of ordinary Ottomans needs to be presumed, Twiss pointed out that the example of consular courts inspired among the population (or rather among their rulers) great respect for foreign law, and was particularly important in diffusing the core elements of commercial law.[111] Crucially, for Twiss, commercial law, trade and the concept of civilisation were intrinsically interlinked.[112] Horowitz advances a similar yet significantly more limited - point when he contends that it was as a result of the conditions attached to the abolition of extraterritoriality that China, Siam and the Ottoman Empire 'came to increasingly approximate the European models of a national state by the early twentieth century'.[113] I take this a step further and argue that this state-building was both the outcome and an essential precondition for the diffusion and smooth reproduction of the CMP. Fidler argues a similar point, even though he does not draw the wider conclusions this thesis does:

> Many of the basic elements of a "civilized" legal system supported capitalism at home and abroad. Under the influence of the standard of civilization, the conditions for economic intercourse established in capitulations were conditions that supported the kind of economic intercourse prevalent in Europe and the United States. Capitalism in both Europe and the United States rested on well-established legal systems that supported free enterprise. Capitulations represented the partial exportation of these legal systems to support commerce in the emerging markets of the uncivilized world.[114]

Finally, it is suggested that, through this process of transformation, nineteenth-century international law was creating the conditions for its own demise. By being a force of social engineering for the promotion of capitalism, international law was forging social change and was pushing towards state centralisation, monopolisation of violence and legal codification. In turn, these material changes were one of the underlying factors for the rapid development of nationalist sentiments outside the West. In this context, overt imperialism and colonialism and international law as a system that organised and theorised these practices became increasingly intolerable. If the above observations are correct, two sets of conclusions follow. First, there was a stark contradiction at the core of international law of the time. On the one hand, its complicity with imperialism and colonialism appears unquestionable. On the other hand, its actual function created the material conditions that led to the questioning and

[111] Twiss (*supra* note 43), 147.

[112] '[N]amely the fundamental elements of commercial law, as they were born by the progress of civilisation and from the needs of commerce.' Ibid.

[113] Horowitz (*supra* note 11), 448.

[114] Fidler (*supra* note 19), 396.

eventually the collapse of these specific structures of foreign domination.[115] Secondly, this contradictory process indicates the limits of the approach that sees international law and institutions as simply 'instruments' at the hands of powerful states. Indeed, the case of extraterritoriality shows that, regardless of the conscious plans and wishes of its designers, the system developed its own dynamics. In this context, the short-term, particularistic interests of specific imperialist powers could delay or distort the process, but overall trends indicate that the rise and fall of extraterritoriality was linked to the impersonal, supra-national process of diffusion of the CMP.

Conclusion

In this chapter, I conducted a comparative historical analysis between two distinct cases of 'semi-civilised' states that were subjected to the practice of extraterritoriality in the course of the nineteenth century. Despite significant cultural, geographical and historical differences, it is arguably the case that the imposition and abolition of the practice were dependent upon the requirement for domestic legal and institutional reforms, including legal codification, centralisation, bureaucratisation of the state apparatus and legalisation of international affairs. Crucially, these reforms were essentially pre-conditions for the establishment and reproduction of the CMP and, hence, extraterritoriality must be understood as an international legal practice which, regardless of the consciousness of its promoters, advanced the diffusion of the capitalist mode of production building upon domestic trends and dynamics. Finally, and given the close association between extraterritoriality and the concept of 'civilisation', the history of extraterritoriality reinforces my claim about the close conceptual and practical links between the standard of civilisation and the diffusion of capitalist relations in territories subjected to formal or (in the case of extraterritoriality) informal imperialism.

Still, attempts by the imperial powers to manage and co-ordinate their expansion failed spectacularly. The outbreak of the First World War shook many of the beliefs of the 'civilised' world, including those of international lawyers. The situation was only complicated by the fact that a power in the close periphery of the 'civilised world', Russia, experienced a communist revolution and was staunchly denouncing all the products of the bourgeois civilisation, including international law. The Mandate System of the League of Nations arose as a method of managing the colonial question at a time when the old (international law) was dying, but the new (international law) was yet to be born.[116] The next chapter of this thesis focuses precisely on the Mandate System as a novel, institutional

[115] For the impact of this process as a cause as well as a limitation of the process of self-determination see Section 4:1 'Decolonisation as homeopathy: the limitations of a revolution' of the thesis at hand.

[116] I am borrowing here Gramsci's classic aphorism: 'This crisis consists precisely in the fact that the old is dying and the new cannot be born: in this interregnum, morbid phenomena of the most varied kind come to pass.' A. Gramsci (ed/tr J. A. Buttigieg), *Prison Notebooks* (Columbia University Press, 1972), Volume 2, 32-33.

method of managing the colonial question and the problem of building sustainable capitalist systems outside the West.

Chapter 3: The Mandates System and the twilight of 'civilisation': building sustainable capitalism in a transitional world

The true nature of the international system under which we were living was not realised until it failed.

Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time

The League of Nations has been synonymous with failure and irrelevance in the grammar of international law and institutions, no less for its gradual demise during the 1930s and its failure to prevent the Second World War, with all the human suffering entailed by these. Nonetheless, in recent years, there has been a revival of interest in the inter-war period and a reassessment of the legacy of the institution.[1] This chapter re-evaluates the functions and legacy of the 'colonial' branch of the League, the Mandates System (MS), and situates it within the broader framework of my argument about the ongoing synergy between international law and capitalism. More specifically, I argue that the MS was an attempt to both legitimise and, more significantly, rationalise colonialism, so as to safeguard the relatively smooth and sustainable transition of the mandate territories to capitalism. In other words, the institution of a soft system of international supervision operated as a force (gently) pushing colonial administrations into creating the political, legal and economic conditions that would facilitate the long-term interests of capitalism, promoting the reforms necessary for the establishment of capitalist relations of production in the mandated territories. In this respect, the reforms promoted by the MS bear significant similarity to those linked to the abolition of extraterritoriality, as analysed in the second chapter of this thesis,[2] with the notable addition of a loose conception of welfarism.[3] In turn, and regardless of the original intentions of its designers, this process of reform further advanced state-centralisation and undermined the conceptual and material foundations of nineteenth-century international law, paving the way for the decolonisation process after 1945.

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[1] Regarding the revival of historical interest and re-evaluation of the era, see: E. Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (OUP, 2007); R. Henig and and A. Sharp, *Makers of the Modern World: The League of Nations* (Haus Publishing, 2010). The new edition of Carr's classic critique with a substantive new introduction by Michael Cox is also part of this trend: E.H. Carr and M. Cox*., The Twenty Years' Crisis 1919-1939: An Introduction to the Study of International Relations* (Palgrave MacMillan, 2001). For the forgotten role of the League in the population exchange between Greece and Turkey, see: U. Özsu, *Formalizing Displacement: International Law and Population Transfers* (OUP, 2014). For the first major work on the Mandates System in fifty years, see: S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP, 2015).

[2] See: Chapter 2 'Extraterritoriality and the civilising mission: international law and social transformation in Japan and the Ottoman Empire' of the present thesis.

[3] For the most comprehensive study of welfarism and international law thus far, see: E. Jouannet (tr C. Sutcliffe), *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP, 2012).

To substantiate this point, I focus on the political and ideological climate of the time in the aftermath of the First Wold War, which rendered direct annexations impracticable, and pointed towards the need for some form of interventionism both at home and abroad in order to sustain the capitalist mode of production (CMP). The specificities of the MS will then be described and situated within this climate. Initially emerging as a compromise between different Western powers (mainly the USA, Britain and France) on how to manage the territories of the powers defeated in the First World War, the system acquired its own dynamics, especially through the function of the Permanent Mandates Commission (PMC). The function of the PMC and its focus on economic development, free trade, free labour and welfarism will be the focal point of the second part of this chapter. My argument is that the PMC—and more broadly the MS—oscillated between continuity and novelty in the way they arranged the relationship between international law, colonialism and capitalism.

3:1 The beginning of the end for formal empires: internationalism, socialism and the rise of nationalism in the periphery

The MS emerged as a solution to the problem of the territories that Germany and the Ottoman Empire lost after their defeat in the First World War. The historical novelty lies in the fact that the old recipe of partition of these territories among the victors and their annexation did not appear as the only and indisputable solution to this problem, even though it was consistently advocated by France.[4] The reasons for this evolution are manifold, but at least three require our attention: first, the US, which emerged as a major global power, objected to these plans, formally opposing (overt) annexationism. Already in early 1917, Wilson had proclaimed that: 'no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property'.[5] Secondly, the 1917 revolution in Russia and the fierce anti-imperialist rhetoric of the Bolsheviks gave rise to fears of contamination and the spread of communism. Finally, the emergence of anti-colonialist, nationalist movements, both in what were going to be the mandated territories, and more generally in the colonies and protectorates, challenged the legitimacy and practicability of national empires.

The original proposal for a scheme of international tutelage belonged to Smuts, the Prime Minister of the Union of South Africa. However, according to him, the system would apply to the former

[4] 'As the Covenant would have prevented France from levying troops in the mandates, direct annexation of former German territories was clearly preferred. A compromise was eventually found which allowed France to levy troops in her mandates in case of war, but such an attitude raised some doubts as to French intentions and willingness to follow the principles of the Covenant.' V. Dimier, 'On Good Colonial Government: Lessons from the League of Nations' (2004) 18 Global Society 279, 283.

[5] W. Wilson, 'Peace Without Victory' Address of President Woodrow Wilson to the US Senate (22 January 1917) quoted in Manela (*supra* note 1), 24.

territories of the Ottoman Empire and Eastern Europe and not to Africa or the Pacific.[6] In this respect, the role of the US and of President Wilson personally in the emergence of the MS is indisputable. American promises of 'a peace of a different kind' and the general attitude of Britain's Lloyd George against outright annexations led to the extension of the system. In fact, the plan President Wilson first submitted drew from a fairly long legacy of theories of international tutelage[7] and proposed a system of direct international administration, where the sovereignty over these territories would actually lay with the League.[8] Undeniably, this outlook was directly linked to Wilson's famous Fourteen Points, and more directly to his call for national self-determination. That said, it is important to bear in mind that the MS was the outcome of a very complicated system of bargaining and compromise, and cannot be reduced to the plans and aspirations of the US. After all, the final months of negotiations took place after President Wilson was defeated by the US Senate, which failed to ratify the Versailles Treaty both in November 1919 and in March 1920.

So as not to overstate the role of the US in the formation of the MS system, one also needs to consider the role of the other emerging power of the time, Bolshevik Russia. After all, it was Lenin who in 1914 put forward the idea of national self-determination[9] without limiting it to European peoples. Moreover, like Wilson, the Bolsheviks 'blamed secret diplomacy and the old elites for the war, but they went further than him in breaking with diplomatic protocol, denouncing past treaties, publishing secret documents, and giving accounts of Trotsky's negotiations with the Germans to reporters as they happened.'[10] Moreover, as Grovogui observes, the October Revolution 'directly challenged notions of

[6] Q. Wright, *Mandates under the League of Nations* (Greenwood Press [1932], 1968), 33. For a general overview of the initial proposal, see: J. C. Smuts, 'The League of Nations: A Practical Suggestion', reprinted in D. H. Miller, *The Drafting of the Covenant* (G.P. Putnam's Sons [1928], 1971).

[7] 'Ideas of imperial tutelage or trusteeship had a long genealogy, with the history of British anti-slavery cited as evidence of the Empire's role in generalizing humanitarian norms.' Pedersen (*supra* note 1), 24. For a comprehensive overview of the idea of international trusteeship and its links with Empire, see: W. Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (OUP, 2003).

[8] 'Any authority, control or administration which may be necessary in respect of these peoples or territories other than their own self-determined and self-organized autonomy shall be the exclusive function of and shall be vested in the League of Nations and exercised or undertaken by or on behalf of it.' W. Wilson's Second Draft or First Paris Draft, 10 January 1919 quoted in P. B. Potter, 'The Origins of the System of Mandates under the League of Nations' (1922) 4 The American Political Science Review 563, 568.

[9] See V. I. Lenin, *The Right of Nations to Self-Determination* (University Press of the Pacific, 2004 [1914]). For an overview of Marxists' stance towards self-determination and international law during the twentieth century, see: B. Bowring 'Positivism versus Self-determination: The Contradictions of Soviet International Law' in S. Marks (ed.) *International Law on the Left: Re-examining Marxist Legacies* (CUP, 2008), 133-68.

[10] M. Mazower, *Governing the World: The History of an Idea* (Penguin, 2012), 126.

legitimacy in the modern state'.[11] Especially during the first decade of the new regime, the fear of contamination of the revolution was vivid and it posed constraints on the manoeuvres available to colonial powers, since the Soviets would rhetorically and, to a degree, practically, denounce imperialism.

This brings us to the last factor that rendered imperial annexation impracticable: local resistance. In the aftermath of the war, anti-imperial sentiment was on the rise across the colonised world. The participation of colonised peoples in the war had given them aspirations for self-government or at the very least more humane imperial rule,[12] and the unwillingness of the imperial powers to live up to these expectations stirred significant unrest.[13] Wilson's promise for self-determination offered hope to colonial peoples and, in spring and summer of 1919, a number of protests, strikes and revolts erupted in places as diverse as Egypt, India, Korea and China.[14] Indeed, China became the only country that, despite its participation in the Paris Peace Conference, did not sign the Versailles Treaty, since the decision of Western powers to allow Japan possession over the region of Shandong provoked outrage in and outside China.[15] Chinese mobilisation against the Versailles Treaty signalled the increasing importance of the masses for the formation of international law and diplomacy regarding the colonial question. Outside the West, 1919 turned out to be the moment for both the rise and the fall of liberal internationalism and many nationalist leaders gradually turned to the Soviet Russia for moral and material support, even if most of them did not embrace communism or socialism.[16] This

[11] S. N. Z. Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press, 1996), 115.

[12] 'For these Africans, the sacrifice of their lives during the war was a debt sealed in blood that could not be reneged. This blood sacrifice (*dette de sang*) was the basis of African demands.' Ibid., 114.

[13] The case of Gandhi is paradigmatic here: 'For Gandhi, this was a moment of transformation, both in his private views and in his public stature. Throughout the war, he had been a staunch supporter of the empire and had worked hard to assist in the recruitment of Indians into the military. Now, however, he realized that his hopes of achieving equality of Indians within the empire had been in vain, and emerged for the first time as a figure of national stature to lead the movement to oppose these "black acts". […] The response to his announcement was unprecedented. Strikes were declared in many of India's cities, and, despite Gandhi's call for the observance of nonviolence, clashes between protesters and police occurred in several places.' Manela (s*upra* note 1), 169.

[14] Manela has documented the largely unwarranted and unpredictable impact of Wilson's proclamation with an emphasis on the above-mentioned countries: Manela (*supra* note 1).

[15] 'It was rather the mobilized Chinese nationalists around the world who had heard the call of self-determination and were determined that China, too, would have it. Largely due to their firm opposition, China became the only state represented at the conference that did not sign the treaty.' Ibid., 193.

[16] Simultaneously some of them would join the communist movement through the anti-imperialist, rather than socio-economic, route. For example, in 1919, Mao Zedong was a young Chinese nationalist sympathetic to

uncomfortable alliance re-emerged in the years of the New International Economic Order five decades later.[17] At the same time, in Paris, the First Pan-African Congress took place and, in its final declaration, appeared to call for international administration of those territories that allegedly were not eligible for immediate independence.[18]

It was within this particular historical context of liberal and socialist internationalism, supported by two newly emergent powers, the US and Soviet Russia, and of local resistance against formal empire, that a scheme of indirect international administration arose to resolve the problem of colonial administration in a changing world, where nineteenth-century international law was gradually collapsing. while the post-1945 generalisation of sovereign equality had not yet emerged. This peculiar context would determine the profoundly mixed legacy of the League of Nations in relation to the colonial question, since its gradual move away from formal empires was accompanied by a rejection of Japan's proposal to institute racial equality, a rejection that was in fact orchestrated by President Wilson.[19]

3:2 The structure and the function of an experiment: oscillating between the nineteenth and twentieth centuries

3:2:1 Article 22: continuation of the civilising mission by other means

The basic outlines of the system were laid down in Article 22 of the League Covenant and the specific arrangements for each Mandate were exemplified in the respective mandate treaties signed between the Principal Allied and Associated (PAA) Powers, the Mandatory and the League of Nations represented by the Council. Importantly, the League was not responsible for political questions such as the inclusion of specific regions in the system or the boundaries of each mandate. As Balfour observed, in discussing the Palestine Mandate, 'mandates were not the creation of the League and

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Wilson's ideas but, right after the USA's support for Japan's imperialist plans for China, he became interested in Bolshevism. Two years later (1921), he joined the Chinese Communist Party. Ibid., 195. Similarly, Ho Chi Minh, who then was 'an obscure young Vietnamese leader', unsuccessfully tried to arrange a meeting with President Wilson to express his people's aspirations against French colonial rule. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005), 140.

[17] For more on the enduring nature of this uncomfortable alliance, see: 'The New International Economic Order: in search of post-colonial international law' in Chapter 4 of the present thesis.

[18] B. G. Plummer, *Rising Wind: Black Americans and US Foreign Affairs, 1935-1960* (University of North Carolina Press, 2007), 17.

[19] 'Wilson viewed with suspicion any suggestion of racial or national equality, even when the equality proposed was limited to the imperialist powers. He vetoed a measure sponsored by the Japanese stating the "equality of nations" […] Later, Wilson opposed any mention of racial equality in the League Covenant.' Grovogui (*supra* note 11), 121.

they could not in substance be altered by the League'.[20] Hence, the Covenant did not in principle specify the regions subject to tutelage. Still, the Covenant was significant since, in Article 22, it specified the general principles and modalities of the MS. To begin with, without mentioning specific regions, the Covenant stipulated that the MS concerned 'those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not *yet* able to stand by themselves under the strenuous conditions of the modern world'.[21] What is of significance here is that the wording of the article indicated the provisional, transitional character of the settlement. The Mandate System was not presented as an institution with aspirations to last indefinitely, but as a necessary intermediate step given that specific people could not yet stand on their own. Indeed, when the PMC was confronted with the question of Iraqi independence, its vice-chairman Van Rees concluded that '[c]learly … this consideration cannot affect the principle—which has been accepted by almost all writers and by the mandatory Powers themselves—that the mandates system implies only a temporary charge'.[22] Or, as Miéville comments, '[b]ut of course, this was an admission that they could learn. The natives, it is claimed, have not *yet* learnt to stand by themselves. These categories through which the mandates were conceived undermined them, *by containing their own end*.'[23]

This reality was also reflected in the three-fold classification of the mandated territories. Following the general pattern of nineteenth-century science and international law,[24] Article 22 embodied a progressivist understanding of history dividing the mandated territories into three categories, according to their perceived degree of development and civilisation. Echoing directly the progressivist outlook of the 'standard of civilisation', Article 22 and the specific mandate agreements constructed a strict hierarchy between the different categories:

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[20] Eighteenth Session of the League of Nations Council (1922) 3 League of Nations Official Journal, 547.

[21] Covenant of the League of Nations (adopted 29 April 1919, entered into force 10 January 1920) [1919] UKTS 4 (Cmd. 153)/ [1920] ATS 1/ [1920] ATS 3, Article 22, para.1 (emphasis added).

[22] Note by M. van Rees, 'General Conditions that must be fulfilled before the mandate regime can be brought to an end in respect of a country placed under that regime' 20 Permanent Mandates Commission Minutes, Annex 3, 197. On the same occasion, Lord Lugard wrote: 'I venture to think that the Council by its reference to us assumes that a mandate is temporary, and that it has competence to terminate it. This is implicit in the question we are asked, and it is not for the Permanent Mandates Commission to dispute the correctness of the Council's view, which I venture to think is beyond any question.' Ibid., note by Lord Lugard, 201.

[23] C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2005), 258-59 (emphasis in original).

[24] See Section 1:3 'Civilisation v. Culture: The broader origins of the concept and its emphasis on institutions' of the thesis.

> The Mandate system enshrined in legal form an evolutionary view of human society. This was evident not just in the notion that colonial powers were bound to the Mandated territories by "a sacred trust of civilisation", but also by the hierarchical organization of the Mandates into A, B, and C categories.[25]

This understanding was reflected in all aspects of the administration of mandated societies. To provide an example that is perhaps marginal, yet illustrative, alcohol-related policies reflected the idea that certain 'races' and civilisations were physically and culturally unable to consume alcohol without descending to moral decay, whereas others were more suitable for it. Hence, consumption of alcohol remained unrestricted in the A Mandates, even though their population was predominantly Muslim, while it was subjected to strict regulation in the B Mandates and was altogether banned in the C Mandates.[26]

In this respect, A Mandates were on the top of this hierarchy. They included Middle East territories formerly occupied by the Ottoman Empire (Palestine and Transjordan, administered by the UK, and Syria, administered by France) and their 'existence as independent nations could be provisionally recognised'.[27] Even though the provisional recognition of independence was a blurred expression with unclear international legal implications, the underlying understanding was that the degree of development of these societies was such that they were just a few steps before being recognised as sovereign states. Berman situated A Mandates in the spectrum of sovereignty as follows: 'if the general Mandate System was a halfway house between colonisation and self-determination, the "A" Mandates ... constituted a half-way house between the Mandate system itself and self-determination'.[28] The statement of Sir Henry Dobbs, that Iraq 'was governed for Iraqis and by Iraqis, helped by small numbers of British advisers and inspectors',[29] might have been dictated by political calculation, but was also reflective of this close-to-independence status of the A Mandates. In fact, the rise of Arab nationalism exerted ongoing pressure upon the British and, as early as 1932, Iraq was granted sovereign status and admitted to the League. This evolution is considered a mere formality and a cynical diplomatic manoeuvre by leading scholars like Pedersen, who stresses how Iraq remained dependent on Britain while imperial control could continue at a lesser cost and without the supervision of the League.[30] Crucially, Britain could play this game of formal(istic) independence

[25] P. Bourmaud, 'Evolutionism, normalization, and the mandatory anti-alcoholism from Africa to the Middle East (1918-1939)' in C. Schayegh and A. Arsan (eds), *The Routledge Handbook of the History of the Middle East Mandates* (Routledge, 2015), 76.

[26] Ibid., 79.

[27] Covenant of the League of Nations (*supra* note 21), Article 22, para. 3.

[28] N. Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Brill, 2012), 270.

[29] Wright (*supra* note 6), 203.

[30] S. Pedersen, 'Getting out of Iraq - in 1932: The League of Nations and the Road to Normative Statehood' (2010) 115 The American Historical Review 975.

precisely because the actual text of Article 22 paved the way for sovereign statehood by directly implying the temporary nature of the MS.

Pursuant to this, B Mandates included former German colonies in Central Africa, where Mandatory powers were granted much broader authority, including the maintenance of an 'open door' policy for all League members, and guarantees for

> freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory.[31]

Finally, C Mandates included South West Africa, New Guinea and small Pacific islands like Nauru, Samoa and those within the South Pacific Mandate. These were in the peculiar legal position to 'be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'.[32] Even though this was commonly interpreted as C Mandates being 'colonies in all but name', the staunch opposition of the PMC to the attempts by South Africa to grant its citizenship automatically to German settlers in South West Africa and its objections to Belgian attempts to govern Rwanda-Burundi as a mere province, hint at a more nuanced, yet messy, arrangement.[33] Eventually, it was this unclear character of C Mandates that enabled South Africa's annexationism against South West Africa and the prolonged relevant international dispute.[34]

This three-fold categorisation of the mandates was important for a number of reasons. First, its three-stage progressivist outlook confirms the survival of the basic structure of the 'standard of civilisation'

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[31] Covenant of the League of Nations (*supra* note 21), Article 22, para. 5.

[32] Ibid. para. 6.

[33] 'At their second session the Commission recommended that inhabitants of both "B" and "C" mandates be given a national status distinct from that of the mandatory power. […] As Rappard said in the Brussels meeting, should the League allow mandatory powers to treat populations as nationals, those who claimed that mandates were nothing than a cloak for annexation would feel vindicated.' Pedersen (*supra* note 1), 72. 'Pressed by the PMC, the Council thus forced Belgium to concede that mandated territories has a distinct status under international law.' Ibid., 220.

[34] See: *International Status of South Africa* (Advisory Opinion) [1950] ICJ Rep 128, *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6. The origin of these cases in the Mandates System as a system of international tutelage is not unrelated to the fact that it was in their context that 'a spate of judicial pronouncements which seemed to define the international judicial function *vis-à-vis* an international "common interest"' began to emerge: G. I. Hernández, *The International Court of Justice and the Judicial Function* (OUP, 2014), 209.

during the first decades of the twentieth century.[35] Apart from the obvious fact that the concept of 'civilisation' was explicitly mentioned in Article 22,[36] the idea that complex societies could be reduced to three stages of development, which represented not simply difference but a rigid hierarchy, is the core idea behind the 'civilisation' discourse, as exemplified both by extraterritoriality during the nineteenth and the MS during the twentieth centuries.[37] Further, the MS was almost by definition organised around the idea that the standard was attainable for non-Western societies, a point that has been stressed already about the standard of civilisation in general.[38] All political communities could achieve 'civilised' status in theory, provided that they implemented the necessary reforms. In fact, the MS was a structure designed to supervise the 'civilising mission' and make sure that mandate powers would not exploit their position to their benefit at the detriment of their reformist mission.

So far it has been argued that, through the concept of civilisation, international law was not unequivocally about establishing hierarchies between different political communities and placing the West firmly on the top, even though this was undeniably part of its function. Much more fundamentally, the concept of civilisation was linked to socio-economic transformation with a view of spreading market relations and the capitalist mode of production outside the West. The MS was perhaps the clearest example of this function. In Article 22 of the Covenant the MS was designed as a temporary system, which was put in place to facilitate reform and lead to its own redundancy. Arguably, its designers and the international bureaucrats who applied it could not have imagined that this redundancy would occur within a few decades. Pedersen concludes her masterful account of the MS, observing that, in 1958, two prominent members of the PMC died while being 'inadvertent architects of a world they had not imagined'.[39] For her, these dynamics – which led to decolonisation – were the outcome of the process of internationalisation and not a product of the conscious design of imperial states, nor of the Covenant itself.[40] Indeed, the MS developed its own dynamics that were not

[35] Contra: 'The nineteenth century idea of a society of civilised nations had already been shaken at the end of the British Age and did not survive the First World War as a basis and framework of international law.' M. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), 581-82.

[36] '… there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.' Covenant of the League of Nations, (*supra* note 21), Article 22, para. 1.

[37] See: Section 1:3 'Civilisation v. Culture: The broader origins of the concept and its emphasis on institutions' of the present thesis.

[38] Ibid.

[39] Pedersen (*supra* note 1), 407.

[40] 'The League helped make the end of empire imaginable, and normative statehood possible, not because the empires willed it so, or the Covenant prescribed it, but because that dynamic of internationalization changed everything- including how "dependent peoples" would bid for statehood, what that "statehood" would

under the control of its designers. However, as argued above, Article 22 contained the possibility for normative statehood in itself; therefore, it is difficult to contend, as Pedersen does, that a piece of international legislation that recognised the provisional independence of A Mandates and was based on the presumption that some communities could not yet stand on their own, was unrelated to subsequent developments of decolonisation. In fact, the MS was a distinctive stage of a broader process of social transformation carried out through international law. In other words, through its application, the standard of civilisation had been pushing towards the expansion of free markets and the necessary political and economic institutions to support market relations since at least the nineteenth century, and Article 22 crystallised trends already present in international legal thought and practice.

3:3:2 The Permanent Mandate Commission: supervising the experiment

What was genuinely innovative about the MS was that its very basic structure dictated and enabled the supervision of the mandatory powers by the League. To begin with, the League Council was nominally considered the single most important organ regarding the function of the MS. It was a standardised clause of the mandate treaties that 'the consent of the Council of the League of Nations is required for any modification of the terms of this mandate'.[41] The Assembly established its right to discuss mandates in its first session and, having a permanent majority of non-colonial states, it developed a critical stance towards colonial governments. Even though its recommendations were not binding, they were taken seriously. For example, their recommendation that at least one woman should participate in the PMC —to which we will turn our attention shortly—was taken on board and two women (Anna Bugge-Wicksell and Valentine Dannevig) served successively on the Commission.[42] Further, the Permanent Court of International Justice authoritatively interpreted the terms of the mandates in case of a dispute between the Mandatory and another member of the League.[43] Finally, the Permanent Mandates Commission was the organ specifically dedicated to the supervision of the MS. The PMC had nine members who served in their personal capacity and only

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henceforth mean, and whether empires would think territorial control essential to the maintenance of global power.' Ibid., 406.

[41] Amongst many, see: Article 27 of the Palestine Mandate (confirmed by the League of Nations on the 24th of July 1922, entered into full effect on the 23rd of September 1923), reprinted in Wright (*supra* note 6), 600-07; Article 12 of the Tanganyika Mandate (signed on the 12th of July 1922, confirmed by the League of Nations on the 20th of July 1922) reprinted ibid., 611-16; Article 7 of the Nauru Mandate (confirmed by the League of Nations on the 17 of December 1920) reprinted ibid., 616-21.

[42] S. Pedersen, 'Metaphors of the Schoolroom: Women Working the Mandates System of the League of Nations' (2008) 66 History Workshop Journal 188.

[43] Amongst many, see: Article 26 of the Palestine Mandate (*supra* note 41); Article 13 of the Tanganyika Mandate, ibid.; Article 7 of the Nauru Mandate, ibid.

four of them were nationals of mandatory powers.[44] Hence, the mandatory powers could not outright turn the Commission into a puppet-organ that would just disguise the uninterrupted continuation of colonial rule. In practice, most members of the PMC had extensive experience in colonial administration.[45] On the one hand, this meant that they held all the assumptions of white supremacy and native 'backwardness' that informed colonial administration in general. On the other hand, their extensive experience meant that they maintained a degree of independence *vis-à-vis* their state of origin, having their own views on how non-Western societies ought to be administered. In fact, those who operated as 'organs' of their governments typically found their influence diminished.[46]

Three broad aspects of the work of the PMC can be detected: legalism, a focus on fact-finding, and a strong inclination for standard-setting. The first aspect was essential, in light of the novelty of the Commission's work. Since international supervision of colonial administration was an innovation and the legitimacy of the PMC was always in question, its members resorted frequently to the Covenant in trying to establish and legitimise their authority and show that they were doing no more or less than Article 22 stipulated. In Anghie's words, '[t]he PMC […] saw its function in legalistic terms. It derived its authority from the Covenant, and its task was to give effect to Article 22.'[47] Despite law occupying a minor position in Pedersen's analysis, she reaches similar conclusions regarding the legalist ethos of the PMC: 'the Commission was constrained—even its most conservative members were constrained—by its deep textualism. It was charged to uphold the authority of the Covenant and the mandates; indeed, its own authority was rooted in those texts.'[48] This faith in the texts indicates that the PMC and the MS indeed developed their own dynamics, but within the framework set by Article 22, the mandate treaties and the Constitution of the Commission and, therefore, their functions

[44] 'The Permanent Mandates Commission provided for in paragraph 9 of Article 22 of the Covenant, shall consist of nine Members. The majority of the Commission shall be nationals of non-Mandatory powers.' Constitution of the Permanent Mandates Commission, Article a (Approved by the Council 1st of December 1920).

[45] 'Its members may have been hard-headed ex-colonial administrators in the middle age, but they were also, in their own way, idealists. They believed in their civilizing mission, in their right to rule.' Pedersen (*supra* note 1), 107.

[46] Martial Henri Merlin, the second French national in the Commission, was a typical example of how openly partisan behaviour was exceptional and was largely ineffective: 'Merlin proved too pompous, indolent, and transparently partisan to win any friends. No one in the Commission much liked him, and when in 1932 he faced a public trial for embezzlement, officials at the Quai d' Orsay squirmed with embarrassment.' Ibid., 111.

[47] Anghie (*supra* note 16), 151.

[48] Pedersen (*supra* note 1), 205. Writing about the stance of the PMC regarding the revival of annexationist plans among the Mandatories, Pedersen also observes that: '[p]recedent and legalism, quite as much as conviction, would drive the PMC to resist those developments'. Ibid., 207.

must be conceptualised not only as the functions of an emerging international bureaucracy, but also as intrinsically linked to international law.

Secondly, fact-finding was an essential function of the PMC. As Rajagopal argues, the trend of collecting information as a means for improving colonial administration began during the nineteenth century, but 'the establishment of international institutions under the League with special responsibility for collecting and analysing such information quickened and solidified the technocratisation of power in the colonial relationship'.[49] Wright's assessment of the PMC was clear in this respect: '[t]he ultimate object of the League's action in regard to mandated territories is to improve conditions in those areas. To do this the League organs must know the facts and have in mind some standards by which they may be criticised.'[50] There were different ways to collect information, though the annual reports submitted to the PMC were perhaps the dominant method used.[51] The Commission attempted to standardise the form and content of the reports by issuing questionnaires which covered multiple aspects of the Mandates' administration, such as slavery, labour, arms traffic, education, and public health.[52] The PMC also put in place a system of petitions concerning the mandated territories, even though there was no relevant provision in the Covenant or its Constitution. Although it is estimated that only 10 per cent of these complaints were upheld,[53] the system functioned as an additional source of information, given that mandatories' reports were often incomplete or even misleading. In this context, statistics emerged as a principal method of international governance,[54] and anthropology—which was already praised by Lorimer during the

[49] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP, 2003), 52.

[50] Wright (*supra* note 6), 190.

[51] 'In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.' Covenant of the League of Nations (note 18), Article 22 para. 7, 'The Mandatory Powers should send their annual report provided for by paragraph 7 of Article 22 of the Covenant to the Commission through duly authorised representatives who would be prepared to offer any supplementary explanations or supplementary information which the Commission may request.' Constitution of the PMC (*supra* note 44), Article b.

[52] See: 'Questionnaire Intended to Facilitate the Preparation of the Annual Reports from the Mandatory Powers'. Reprinted in: D. Hall, *Mandates, Dependencies and Trusteeship* (Stevens and Sons, 1948), 319-22.

[53] Pedersen (*supra* note 1), 91.

[54] 'The Commission has sought to complete statistical tables of the mandates areas in order that progress in various directions may be tested and at the ninth session asked the Council to authorize the Secretariat to request the mandatories to submit supplementary data not included in the reports.' Wright (*supra* note 25), 165.

nineteenth century[55]—assumed a central function in facilitating the management of mandate territories.[56]

Thirdly, the PMC developed standards and measurements in order to classify and make sense of the immense volume of collected information. Article 22 was fairly vague on the point of how the Mandates were to be governed, placing the 'well-being and development' of the locals at the heart of the 'sacred trust of civilisation',[57] but without providing further specifications. As Anghie argues, this process of standard-setting created a 'synthesis of law and administration'.[58] In fact, both members of the PMC and the League Assembly were convinced that these standards were of broader applicability and they should be used to influence colonial administration outside the Mandates.[59] A call for the codification of these standards failed,[60] but there was a widespread conviction that, through its work, 'a science of colonial administration based on a deductive and experimental method'[61] was being born. Analogies between this outlook and the subsequent function of international organisations are too stark to miss, especially in the area of 'best practices' and 'guidelines' regarding economic governance. Sixty-five years later, when the US/UK administration of Iraq was trying to legitimise its decisions invoking 'international best practices', it was essentially building on the evolving legacy of the Mandates System and the ambition to standardise foreign administration and economic management of territories deemed 'uncivilised' through the work of international institutions.[62]

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[55] Lorimer considered 'ethnology' or 'the science of races' (sic) to be the most influential discipline for international law at the time: M. J. Lorimer, 'La doctrine de la reconnaissance, fondement du droit international' (1884) 16 Revue de droit international et de législation comparée 333.

[56] 'Yet, for the Mandated Territory in particular, the "anthropological turn" *was* important, not only because it helped officers distance themselves from a pervasive planter culture that saw the "native" as (in the words of one all too representative employer) "a child, but… also a born thief, liar and blackmailer", but also because it provided that administration with a language, policies and a person – Chinnery - able to reconcile their labour policy to the norms of the "sacred trust".' Pedersen (*supra* note 1), 303 (emphasis as in original).

[57] Covenant of the League of Nations (*supra* note 21), Article 22 para 1.

[58] Anghie (*supra* note 16), 152.

[59] The Japanese member of the Commission, Yanagita Kunio, characteristically noted that: 'the successful results which could be obtained within a short time in some territories where circumstances are favourable would be of great use, not only as regards other mandates but also for the Colonies of the whole world'. Wright (*supra* note 6), 228-29.

[60] 'In discussing this suggestion, however, several members of the Commission expressed the fear that such an effort to codify mandatory principles might prove impracticable in view of the varied conditions in the different territories, and preferred to allow standards and principles gradually to emerge from precedents.' Ibid., 220.

[61] Ibid., 229.

[62] 'The purpose of the International Advisory and Monitoring Board (IAMB) shall be to promote the *objectives set forth in United Nations Security Council Resolution 1483* (2003) (Resolution 1483) of ensuring that the

To conclude, the PMC was a legalist organ, but the vague nature of Article 22 meant that it had to develop novel administrative techniques in order to operationalise its provisions. In fact, this turn to statistics, standards and other disciplines was a broader trend for international law at the time. For example, Article 23 of the Covenant introduced co-operation for a wide range of social and economic issues and the specialised institutions that were founded in order for this co-operation to materialise[63] operated in a similar way as the PMC in collecting information and creating standards for evaluating policies. It was this overall institutional dynamics that enhanced the position of the PMC and prevented it from becoming a mere instrument at the hands of the colonial powers at the time.

3:3 Capitalist transformation and international law: labour, trade and welfare in the Mandates

Writing about the history of the PMC, Pedersen argues that '[i]f sovereignty was the most contested issue with which the Mandates Commission had to deal, the question of economic rights—for the mandatory power, other League states, and the local population alike—ran a close second'.[64] In this section, I will contend that the two issues were in fact interlinked, at least in one aspect: the Mandates System was an additional episode in the process of diffusion of the capitalist mode of production (CMP) through international law and institutions. So far, it has been argued that the transformation of pre-capitalist societies into market economies was a central function of the concept of civilisation, as it was operationalised through practices such as extraterritoriality.[65] It is further suggested that the Mandates System was at least partly a manifestation of the same broader process that was in operation at least since the second half of the nineteenth century. Thus, the Mandates Commission sought to promote different aspects of the standard of civilisation in the mandated territories. However, the diffusion of capitalism through the Mandates System was enriched with a crucial addition. With *laissez-faire* liberalism in profound crisis, the question of welfarism and the sustainability of capitalism entered political, legal and economic thought. This was also reflected in the functions of

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Development Fund for Iraq (DFI) is used in a transparent manner […] and that export sales of petroleum, petroleum products and natural gas from Iraq are made consistent with *international market standards*.' Coalition Provisional Authority 'Terms of Reference for the International Advisory and Monitoring Board (IAMB)' (21 October 2003). Available at S. Talmon, *The Occupation of Iraq: Volume 2: The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (Hart Publishing, 2013), 1442 (emphasis added). For further analysis on international law and the occupation of Iraq, see Chapter 6 of the thesis.

[63] For a concise analysis of Article 23 of the Covenant of the League of Nations, which also links the provision with the subsequent Article 55 of the UN Charter, see: G. I. Hernández, 'Article 23' in M. Schmidt and R. Kolb, *Commentaire sur le pacte de la Société des Nations: article par article* (Bruylant, 2014).

[64] Pedersen (*supra* note 1), 233.

[65] See Chapters 1 and 2 of this thesis.

the MS. In fact, my principal argument here is that what was self-assuredly branded as 'disinterested humanitarianism' in juxtaposition to 'acquisitive nationalism',[66] was in fact an expression of international law's systematic privileging of the long-term, general interests of capitalist reproduction.

3:3:1 From 'civilised' to 'emancipated': conditions for statehood under the Mandates System and the persistence of 'civilisation'

The survival of the 'standard of civilisation' through the MS was not purely rhetorical.[67] This became evident when Britain started pushing for the independence of Iraq and its admission to the League.[68] Given the justified suspicion of other League members and of the CMP that Britain was attempting to circumvent international supervision and create a protectorate, the Council requested that the PMC determine the preconditions for a Mandate to be terminated. The PMC tried to avoid the specificities of Iraq as much as possible, which resulted in the promulgation of generalised standards instead of an *ad hoc* examination that would have been necessarily distorted by particularistic interests.[69] In short, the PMC concluded that for a mandated territory to become independent, the following conditions had to be fulfilled:

> a) It must have a settled Government and an administration capable of maintaining the regular operations of essential Government services;
>
> b) It must be capable of maintaining its territorial integrity and political independence;
>
> c) It must be able to maintain the public peace throughout the whole territory;
>
> d) It must have at its disposal adequate financial resources to provide for normal Government requirements;

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[66] 'First, as the Mandates System, so the Trusteeship also was born of a compromise between disinterested humanitarianism and acquisitive nationalism.' W. E. Rappard, 'The Mandates and the International Trusteeship Systems' (1946) 61 Political Science Quarterly 408, 413.

[67] *Contra*: Grewe note 35 above.

[68] See note 30 above.

[69] 'On January 22nd, 1931, the Council decided to invite the Permanent Mandates Commission to pursue the study of the problem of the termination of a mandate in its "general aspect". The discussions which preceded this decision clearly showed that the Council does not expect this examination to extend to any particular cases or to the question of the conditions required for the admission of a mandated territory to the League. […] This resolution makes no distinction between the various territories at present under mandate. The Commission is therefore called upon to examine the three categories of territories under A, B, and C Mandates, although it is obvious that, as regards the last two categories, the question is of purely theoretical interest.' Note by M. van Rees (*supra* note 22), 195.

e) It must possess laws and a judicial organisation which will afford equal and regular justice to all.[70]

What is striking here is that these preconditions were essentially a restatement of the requirements for a political society to be considered civilised, as summarised by Gong[71] and crystallised in state practice around extraterritoriality[72] in the decades preceding the MS. In essence, for the Mandate to be terminated, political communities needed to display core features of the modern capitalist state: territorialisation of relations of power, state monopoly over legitimate violence through pacification of social forces, judicialisation of social relations through legal reform and codification so that laws supported core market functions. In addition to these attributes, the criteria of the PMC were more explicitly concerned with economic functions than their nineteenth-century version. This is clear in the fourth criterion, which requires public finances of at least some soundness so that they can support 'normal Government requirements'. As Lugard, the British Commissioner, noted, for a mandated territory to be emancipated, it needed to have the rudimentary capacities of the modern capitalist state:

> The Council must be satisfied that the Mandatory has good grounds for its belief that the new State can maintain internal order and efficient government; that the Government of the area released from the mandate is acceptable to the majority, and the welfare and just treatment of racial, linguistic and religious minorities are assured; that the State is able and willing to fulfil the obligations it undertakes; that it has functioned for a certain time with success; and that there is an adequate prospect for economic and financial stability.[73]

Apart from physical control over territory, these rudimentary capacities presumably included all these functions of the mandate powers that the PMC was supervising so closely: education and hygiene, labour management and infrastructure development and maintenance, to mention but a few.[74] Other

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[70] Ibid., 228-30.

[71] Gong has summarised the criteria to be fulfilled for a polity to be considered 'civilised' as follows: '1. Guarantees of basic human rights, such as life, dignity, property, freedom of movement, of commerce and of religion. 2. The existence of a vertically and bureaucratically organised state apparatus, capable of armed self-defence. 3. The legalisation of domestic and foreign affairs. This included codification and publication of laws along with the establishment of a professionalised, independent judiciary were central parts of this process. 4. Maintenance of permanent diplomatic relations with the outside world. 5. Abolition of "uncivilised" practices, such as polygamy, suttee and slavery.' G. W. Gong, *The Standard of 'Civilization' in International Society* (OUP, 1984), 14-15.

[72] For extraterritoriality as a principal expression of the 'standard of civilisation' and its close links with the transformation of archaic societies into capitalist economies, see Section 2:3 'Beyond culture: Constructing a materialist narrative of extraterritoriality' in Chapter 2 of the present thesis.

[73] Note by Lord Lugard (*supra* note 22), 202.

[74] 'Mlle Dannevig, referring to the conditions which must exist in a territory before it is released from the mandate, considered that a modern state should not only ensure the maintenance of peace and order by means of armed forces and police, but should also take positive steps to promote the development of its inhabitants by

than that, the fifth criterion of the PMC reflected the demand for legal reform that was so strikingly present in the history of extraterritoriality. It is a central argument of this thesis that these legal reforms were intrinsically linked to the spread and consolidation of capitalist relations of production in semi-peripheral countries.[75] Thus, even though the PMC did not substantially elaborate on how it understood these references to legality and justice, past legal practice can help us clarify this criterion. The history of imperial legal reform under extraterritoriality regimes indicates that 'equal and regular justice to all' was linked with the abolition of feudal and other archaic legal systems and the establishment of a state monopoly over legality. Further, the individualisation of the social body necessary for a market economy to function was crafted through the establishment of individual rights. The development of guarantees for property rights and commercial activity was also deemed essential for the achievement of 'justice', as stipulated in the fifth criterion. This is clearly hinted at in the Report of Count de Penha García, who explicitly stated that a territory's capacity for self-government was linked to its ability to be integrated smoothly in 'the present political, economic, commercial and other conditions of the modern world' and identified 'the spirit of the legislation in force' as one of the factors that would enable this smooth integration.[76] For a territory to be integrated into the liberal capitalist order of the time, it was essential to amend its legislation and create a legal and institutional environment capable of supporting generalised market functions. Further, for this legal system to be effective, the state needed to assume effective control over territory and be able to enforce these laws over tribal, feudal or other interests. The preoccupation of the PMC's criteria with control over territory was reflective of this core requirement for effectiveness of legislation and of dissolution or subordination of pre-capitalist structures of power.

Pressure towards state centralisation was also vividly present in the way the Mandates were administered. For example, the British administration of Transjordan undertook comprehensive land reform centred around the imperative of 'state-simplification', which was in essence 'an intrusive process of classifying, mapping, and enumerating society and space to make them legible to the agents of government for fiscal extraction or administrative regulation'.[77] Through this process, 'a

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means of education. The State should also create in its territory general health conditions, which would enable the population to avoid disease and to keep in good health. She therefore proposed to add a paragraph to the following effect: "It should possess an educational and health organisation which, while possibly not having reached full development, demonstrates the intention of the new State to take an interest in the mental, moral and physical health of its inhabitants." The Chairman pointed out that the provisions as adopted of paragraph (a) of Chapter I covered the points mentioned by Mlle Dannevig.' 'General Conditions that must be fulfilled' (*supra* note 22), 179.

[75] Ibid.

[76] Report by Count de Penha Garcia (*supra* note 22), 206.

[77] T. Tell, 'The Social Origins of Mandatory Rule in Transjordan' in Schayegh and Arsan (*supra* note 25), 219.

homogenizing, centralizing discipline'[78] arose, which was not only gradually dissolving traditional patterns of land ownership, but also consolidating state structures with effective control over territories and populations. Similarly, the generalised effort of the mandatory powers to collect taxes presupposed a developed bureaucracy with sufficient data about economic activity and the planning and infrastructure necessary to collect and administer public revenues.[79] This commitment of both the PMC and mandatory powers to state centralisation meant that when decolonisation struggles erupted a few decades later, they built upon as well as were restrained by the material conditions fostered and solidified through the colonial encounter.[80] As will be argued in the next chapter of this thesis, the fact that decolonisation assumed the form of state creation is at least partly attributable to the changes in the fabric of colonial societies brought about by international law and international institutions in the course of the colonial encounter.[81]

In addition to the criteria for independence examined above, the work of the PMC directly reflected the criteria of the standard of 'civilisation' at least in one more aspect: the problem of (free) labour. To begin with, enforcement of the prohibition of the slave trade was explicitly mentioned as one of the core obligations for the B Mandates.[82] Secondly, an International Labour Organization (ILO) representative was appointed to the PMC with 'the right of attending in an advisory capacity all meetings of the Permanent Commission at which questions relating to labour are discussed'.[83] Thirdly, and more importantly, prohibition of forced or compulsory labour was incorporated expressly in all B and C Mandate agreements.[84] Exceptions to this prohibition were only granted for public

[78] Ibid.

[79] Wright generally considered increases in public revenue to be a positive sign of administration and development. Wright (*supra* note 6), 574-75.

[80] For an analysis that emphasises the material - as opposed to discursive - impact of the Mandates System, focusing on the electrification of Palestine, see: F. Meiton, 'Throwing Transjordan into Palestine: electrification and state formation, 1921-1945' in Schayegh and Arsan (*supra* note 25), 275-90.

[81] See Section 4:1 'Decolonisation as homeopathy: the limitations of a revolution' in Chapter 4 of the thesis at hand.

[82] 'Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade' Covenant of the League (*supra* note 21), Article 22 para. 5.

[83] Constitution of the Permanent Mandates Commission (*supra* note 44).

[84] Amongst many, the Tanganyika Mandate read as follows: 'The Mandatory: (1) shall provide for the eventual emancipation of all slaves and for as speedy an elimination of domestic and other slavery as social conditions will allow; (2) shall suppress all forms of slave trade; (3) shall prohibit all forms of forced or compulsory labour, except for essential public works and services, and then only in return for adequate remuneration.' Quoted in Wright (*supra* note 6), 611.

works or services and in return for adequate remuneration.[85] The gradual emancipation of all slaves was also one of the obligations assumed by the mandatories and supervised by the PMC. As has already been argued, the abolition of slavery was closely linked to the development of capitalism, since the creation of free labourers is an essential precondition for the emergence of capitalism as a distinctive mode of production where labour power emerges as a commodity sold by nominally free and equal labourers.[86]

This effort was combined with the ambition to achieve 'development' for the territories, especially given that development was explicitly mentioned as one of the goals of the MS in Article 22.[87] In other words, the creation of free labour was in immediate tension with other requirements for the effective function of capitalism, including the building of infrastructure such as road networks or railways that would allow both the intensification of commercial activity and the effective unification and control of territory. In fact, the importance of infrastructure – and especially railways – for capitalist development and state-centralisation had already become clear by the mid-nineteenth century: '[t]he railroad influenced political organization in two fundamental ways—first by reinforcing the credibility of the nation-state as a cohesive arena of collective decision making, secondly, by enabling and favouring new coalitions of historical actors to seize leadership within states.'[88] Thus, what can be seen as tensions between the demand for the abolition of slavery and the demand for development were in fact contradictory aspects of the process of transforming the mandated territories into capitalist economies. Article 22 incorporated these two significant aspects of this process (free labour and infrastructure), but in practice the tensions that arose from the two requirements were difficult to reconcile and the PMC was striving to strike an almost impossible

[85] Article 3 of the Nauru Mandate also read: 'The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services and then only for adequate remuneration.' Nauru Mandate (note 39). The Rwanda-Urundi Mandate repeated verbatim the provision of the Tanganyika Mandate, with the sole difference that it permitted forced labour only for 'public works and essential services', setting, presumably, an even higher threshold: Article 5 para 3. Rwanda-Urundi Mandate (signed on the 12th of July 1922, confirmed by the League of Nations on the 20th of July 1922) reprinted in Wright (*supra* note 6), 611-16.

[86] See Section 1:4:3 'Abolition of slavery and free labour: *vogelfrei* labourers as civilisation' of this thesis.

[87] 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the *well-being* and *development* of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.' Covenant of the League of Nations (*supra* note 21), Article 22, para a. (emphasis added).

[88] C. S. Maier, *Leviathan 2.0: Inventing Modern Statehood* (Belknap Press of Harvard University Press, 2012), 88.

balance. Finally, the particularistic interests of mandate powers aggravated these contradictions. For example, in Rwanda, Belgian efforts to organise a system of labour extraction accentuated and racialised the divisions between Hutus and Tutsis, an event with devastating future ramifications.[89] However, it is impossible to conclude that the interest of the League in the abolition of slavery was only rhetorical and easily disregarded. The PMC followed the formulation of the provisions of the mandates agreements and considered the prohibition of forced labour the rule; all exceptions to this rule needed to be specifically justified. The fact that the PMC only approved of Belgium's system of forced labour in Rwanda-Burundi in the light of the need to prevent another famine outbreak indicates how there was a strong presumption against such measures and, therefore, a general commitment in the creation of free labourers.[90]

With nineteenth-century moralism in decline, it became clearer that the above-mentioned criteria were not primarily cultural, religious or racial. Adherence to Christianity was not mentioned even in passing, and as the Assyrians of Iraq were to find out, the PMC and the League were in fact content to disregard the concerns of Christians and grant a Muslim-majority country (nominal) independence, even if that meant that Christians' livelihood was directly compromised.[91] Further, the criteria of the PMC are clearly institutional, legal and political, but not cultural. In fact, the PMC's adoption of Lugard's ideal of 'indirect rule' not only tolerated but actively encouraged these aspects of native cultural heritage that could facilitate capitalist development.[92] Decades later, the Coalition Provisional Authority of Iraq followed the PMC's precedent and granted Islam an unprecedented position in the Iraqi Constitution, while at the same time promoting the most comprehensive and rapid programme of neoliberal reform in at least three decades.[93] The MS was not hostile to the perpetuation, accentuation or even invention of cultural norms, provided that they were integrated in a broader system of

[89] 'When asked this question at the 1933 Commission session, however, Halewyck de Heusch insisted that "race hostility" had no place in the social order. "The lower race recognized all the qualities of the higher race," he insisted; the Hutu masses "showed real veneration for the Watutsi nobles". In this terrible claim we can detect the spectre of much human suffering.' Pedersen (*supra* note 1), 252.

[90] For an overview of how the outbreak of a devastating famine that claimed the lives of 35,000-40,000 Rwandans in 1929-1030 legitimised Belgian practices of forced labour in cultivation and road-building, see: Pedersen (*supra* note 1), 243-250.

[91] Assyrians of Iraq were not only Christians but they had also been the 'shock troops of the British occupation'. However, when the independence of Iraq was decided, both Britain and the PMC decided to ignore their objections, which turned out to be legitimate: 'In its first year of independence, 1933, the Iraqi Army would sweep through Assyrian villages, massacring as they went.' Pedersen (*supra* note 1), 282.

[92] In his *Dual Mandate*, which was published just before he assumed his position in the PMC, Lord Lugard defended the idea of using native governing structures for ruling the colonies, specifically emphasising the case of Nigeria. See generally: Lord Lugard, *The Dual Mandate in British Tropical Africa* (Frank Cass & Co, 1922).

[93] See notes 86 and 87 of Chapter 6 of this thesis.

capitalist accumulation and state-centralisation. As Yanaghita, the Japanese Commissioner noted, 'a certain number of ancient customs, on which native life is founded, must be preserved in the interest of peace in the territory'.[94]

This focus of the PMC on economic transformation did not escape Anghie, who, despite his emphasis on culture, acknowledges the centrality of capitalist economic form in the management of the Mandates, only to go on and state that this was nothing but the specific *form* of cultural difference assumed at the time:

> [c]rucially, the problem of cultural difference was presented in the Mandate System not in terms of the distinction between the civilized and the uncivilized, but rather in terms of the "backward" and "advanced". […] It is in the Mandate System, then, that we arrive at this pivotal moment, when the "uncivilized" are transformed into economically backward.[95]

As was argued in Chapter 1 of the present thesis, Anghie's argument is undermined by the fact that his conceptualisation of 'culture' remains elusive.[96] Finally, as was argued above, the criteria of the PMC had deep roots in the history of international law. In that sense, the workings of the PMC, at least in the promulgation of independence criteria, was less novel than Anghie or Pedersen assumed.[97] By and large, the preconditions for emancipation from the MS were a refined, less moralised reflection of the conditions for achieving 'civilised' status during the nineteenth century and the first few decades of the twentieth century. In turn, these conditions were intrinsically linked to the construction of a modern, capitalist state, able to ensure the conditions for the establishment and reproduction of the capitalist mode of production.

3:3:2 On continuities and breaks: the emergence of welfarism and the Mandate System

So far it has been argued that the persistence of the 'civilising mission' in the workings of the Mandates System was not exclusively, or even primarily, rhetorical. Rather, I have shown that the criteria for the lawful termination of a mandate as elaborated by the PMC were a direct reflection of the criteria for achieving 'civilised status' during the nineteenth and early twentieth century. In turn, these criteria were directly linked to the spread and smooth reproduction of the capitalist mode of production. However, the MS was not simply a façade for the uninterrupted continuation of nineteenth-century colonial international law. One important aspect of the social functions of the MS and related international law, which is found both in the monitoring processes and standard-setting

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[94] Note by Kunio Yanaghita 'The Welfare and Development of the Natives in Mandates Territories' 3 Permanent Mandates Commission Minutes, Annex 19, 282.

[95] Anghie (*supra* note 16), 189.

[96] See Section 1:3: 'Civilisation v. Culture: The broader origins of the concept and its emphasis on institutions' of the thesis at hand.

[97] 'When and how might a territory achieve statehood? In late 1930 and early 1931 the Commission - well aware that it was making international law - began hammering out doctrine.' Pedersen (*supra* note 1), 267.

functions of the PMC, was welfarism. Indeed, this was a broader trend of international legal theory and practice in the inter-war years. Jouannet has conceptualised this welfarist turn as a 'promise of a major revolution to come for the liberal framework of classical international law'[98] and has written extensively on the ILO, despite paying little attention to the PMC as a locus of welfarist thinking in that period.[99] Nonetheless, promoting native well-being was one of the objectives of the MS, as stipulated in Article 22.[100] To fulfil this goal, the PMC monitored mandatory powers' efforts regarding land management, education, health, and labour, while transforming the international legal definition of statehood to include limited welfarist functions. Linking this welfarist turn with the overall emphasis of the present thesis on international law and capitalism, I further argue that there was a necessity to safeguard the long-term interests of capitalist development and the crisis of *laissez-faire* liberalism–and not abstract humanitarianism—that dictated this turn.

For example, the meaning of 'normal Government requirements' in the criteria for the termination of the MS was distinct from the simple maintenance of public order; as the Minutes of the PMC reveal, these functions included a minimum standard of welfarism in health, education and labour.[101] Moreover, the PMC monitored the administration of the mandates in reference to certain welfarist objectives. The shift was evident: during the eighteenth and nineteenth century, the extermination of local populations was generally seen as a natural process. The PMC considered demographical collapses and high mortality as evidence of bad administration: 'Mr Rappard of the Mandates Commission has insisted that "if the native races were dying out, it was clear that their moral and material welfare were being sacrificed".'[102] Against this background, public expenditure for health or education was an important criterion for evaluating the success of the MS. Even though the statistics of the time are unreliable, Wright defended the MS by arguing that '[i]n 1926 the health expenditures in African areas compared favorably with those in neighboring colonies of the mandatory'.[103] Similarly, relatively high expenditure on and increasing access to education were seen as principal achievements of the MS:

> French progress in education in Togoland and Cameroons was particularly notable. The expenditures doubled from 1920 to 1927, though at the end they were only one-third of the health expenditures. […] The proportion of the population in the schools, 2.2 per cent in French Togoland and 2 per cent in French Cameroons, was far beyond the average in West African colonies.[104]

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[98] Jouannet (*supra* note 3), 178.

[99] In a similar vein, Jouannet examines at length the relationship between classical international law and colonialism but she largely ignores the interplay between welfarist concerns and colonialism. Ibid., 143-51.

[100] See note 87 above.

[101] See note 74 above.

[102] Wright (*supra* note 6), 550.

[103] Ibid., 553.

[104] Ibid., 561-62.

Crucially, welfare was tightly linked to the question of labour:

> [h]ealth is undoubtedly an important element in human welfare, and the Mandates Commission has often drawn attention to conditions such as recruiting labor for work at a distance which might militate against it. The Commission has also requested an explanation of heavy mortality in certain types of labor and suggested increases in medical staff, adequate health expenditures, and instruction in hygiene in schools.[105]

This turn to welfarism ought to be understood in reference to the potential of social destruction, which is immanent to the capitalism mode of production. The fundamentally destructive power of capital over labour is key in Marxian critiques of capitalism. Competition forces each individual capital to reduce salaries and other costs related to labour (for instance, health and safety measures) and to press for the extension of the working day. This is an objective process that cannot be reduced to the 'greed' or any other objectionable personal characteristic of the capital owner; nor is it a moral issue.[106] When no regulation of the labour process is in place, whoever does not conform to the above tendency will sooner or later go bankrupt. Here lies a fundamental contradiction between the interests of the individual capitals and of the capital as a social force. The suppression of wages, the extension of the working day and the lack of any welfare system might be beneficial for each capitalist individually, but these practices endanger the normal reproduction of the labour force as a whole. This is because, at a very basic level, the value of the commodity 'labour power' equals the value of all the products necessary for the reproduction of the labour power. That is, the worker must cover the absolute minimum needs for alimentation, housing and clothing, along with the corresponding needs of his/her children. When the salary drops below this level, or when exploitation is so intense that it undermines the working capacity of the worker, the long-term interests of capital as a social force are imperilled.

This destructive potential of capitalist development became evident in the course of the nineteenth century. In 1844, Engels published his classic book on the appalling condition of the English working class,[107] while a century later Polanyi argued that the central preoccupation of nineteenth-century sociology and political economy was the pervasive, unprecedented poverty that accompanied the

[105] Ibid., 552.

[106] Marx explains the objective character of the struggle over the length of the working day as follows: 'The capitalist maintains his rights as a purchaser when he tries to make the working day as long as possible... On the other hand, the peculiar nature of the commodity sold implies a limit to its consumption by the purchaser, and the labourer maintains his right as seller when he wishes to reduce the working-day to one of definite normal duration. There is here therefore, an antinomy, of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides.' K. Marx, *Capital*: *A Critique of Political Economy* (Lawrence and Wishart, 1954, 1977) Volume 1, 225.

[107] See generally: F. Engels, *The Condition of the Working Class in England* (Penguin, [1844] 2009).

Industrial Revolution and colonial expansion.[108] Indeed, the destructive potential of market expansion was felt both at the centre and the periphery of capitalism and led to significant social unrest. As Jouannet observes,

> a new indigent population appeared that experienced both poverty and loss of status. The dreadful conditions of manual workers, the injustices and inequalities of the system generated succeeding economic and social crises at regular intervals, and that ended up sowing doubt about the capacity of liberal and financial capitalism to ensure growth and progress.[109]

The First World War and the subsequent re-arrangement of the international legal order provided an opportunity for the incorporation of welfarist concerns in the discipline: 'for most politicians and international lawyers of the age it was not a matter of dismissing the liberal purpose of international law in force among civilized states, but rather of redirecting its aim in a more social direction;'[110] In an attempt to tame the most extreme aspects of capitalist exploitation and to prevent violent anti-capitalist revolutions. In a number of conventions concluded shortly after its establishment, the ILO attempted to rationalise capitalist exploitation by setting minimum age requirements for industrial and agricultural employment, regulating weekly rest and night work for women.[111] In this respect, the foundation of the ILO was indeed 'an emblematic and principal turning point of international law'[112] in such a direction, and it was also accompanied by Article 23 of the Covenant and by the incorporation of welfarist concerns in colonial administration through the MS. However, this welfarist turn need not be romanticised or exaggerated. During the same period, in the absence of international financial institutions 'the League's main economic strategy had been to stabilize capitalism[113] and prevent the spread of socialism: '[t]he League's currency stabilization packages were basically written, as a British Foreign office official put it, in order to keep places like Austria and Hungary "from throwing up their hands and going Bolshy".'[114] The League incorporated indeed certain

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[108] 'Up to the time of Speenhamland no satisfactory answer could be found to the question of where the poor came from. It was, however, agreed among eighteenth-century thinkers that pauperism and progress were inseparable. […] When the significance of poverty was realized, the stage was set for the nineteenth century.' K. Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Beacon Press, [1944], 2001), 108, 116.

[109] Jouannet (*supra* note 3), 169.

[110] Ibid., 174.

[111] ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Entry into force: 13 Jun 1921); ILO Convention concerning the Application of the Weekly Rest in Industrial Undertakings (Entry into force: 19 Jun 1923); ILO Convention concerning Employment of Women during the Night (Entry into force: 13 Jun 1921).

[112] Jouannet *(supra* note 3), 177.

[113] Mazower (*supra* note 10), 150.

[114] Ibid. 152.

welfarist concerns, while imposing on states like Austria a strict austerity programme.[115] At the same time, the PMC would consider the establishment of a Jewish-Arab communist party in Palestine to be an existential threat that it needed to address urgently.[116] All these initiatives, despite their seeming contradictions, were in fact instances of the same process of stabilising capitalism during a moment when both internal and external challenges threatened its viability. In the context of the MS, welfarism took the rhetorical form of impartial humanitarianism. Without questioning the sincerity of the intentions of its proponents, my argument here is that the rise of welfarism was part of the broader process of spreading and safeguarding capitalism through international law and institutions.

Conclusion

The partial and limited internationalisation of colonialism through the Mandates System was the outcome of a politically singular moment involving the rise of liberal and socialist internationalism, the emergence of anti-colonial and nationalist movements and a particular balance of power between imperial powers of the time. However, the MS was not simply historically contingent, but represented both a continuation and a 'great transformation' in the triangular relationship between international law, capitalism and colonialism. In a nutshell, through its workings, the PMC refined further the criteria for a political community to be a subject of international law and possess full sovereignty. These criteria largely overlapped with those for a political community to be considered 'civilised' in the course of the nineteenth and early twentieth centuries. State centralisation, legal reform, territorialisation of power relations and some degree of interventionism were necessary prerequisites for the establishment and smooth reproduction of the capitalist mode of production.

In this respect, the MS was a continuation of nineteenth-century international law, in that it was part of a broader process of social transformation towards the globalisation of capitalism. By privileging

[115] 'The prestige of Geneva rested on its success in helping Austria and Hungary to restore their currencies, and Vienna became the Mecca of liberal economists on account of brilliantly successful operation on Austrian krone which the patient, unfortunately, did not survive.' Polanyi (*supra* note 108), 25.

[116] 'The Chairman stated that, according to an article in the French Press on February 1st, 1931, a Communist Congress composed of Arabs and Jews had met at Jerusalem in December 1930. An organisation had been formed in which the Arab element was predominant. He asked if these arrangements had been made with the knowledge and permission of the British Government. The Arabs said that the Communists were mostly found among the Jews, while the Jews stated that most of the Communists in Palestine were Arabs. […]The CHAIRMAN was glad that the Intelligence Service had been re-organised and hoped that it would work quite satisfactorily. He added that, as the service was now better organised, it would be inexplicable if the French Press were better informed than the Administration. It was evident that some circles were alive to the danger of Communist activity in Palestine. He therefore hoped the Palestine Government would keep this danger in view.' 'Communist Activity in Palestine' (*supra* note 22), 87-88.

one specific form of social and political organisation (capitalist societies governed by nation-states) and by promoting, co-ordinating and legitimising the reforms necessary for the function of that system, the Mandate System was altering profoundly the mandated territories in a similar manner as extraterritoriality transformed semi-peripheral countries some decades earlier. However, the MS was also novel in significant ways. First, this process of transformation took place through an international organisation that enjoyed relative functional autonomy. The PMC developed significant functions, including data collection, standard-setting and monitoring of colonial powers. This emergence of the international institution as a locus of colonial administration was a novel phenomenon of persistent importance, since it enabled a better (always judged against inter-systemic standards) balance between particularistic colonial interests and the long-term interests of capitalism. Secondly, it was through the work of the PMC that welfarist concerns entered formally the equation of colonial management. This welfarist turn of international law was part of a broader social transformation that had been initiated in the final quarter of the nineteenth century and entailed the demise of *laissez-faire* liberalism and the rise of the interventionist state. International lawyers and bureaucrats of the time attributed this turn to noble humanitarianism, but reality was a bit less idealistic: both internal contradictions of capitalism as a system of production and the rise of the 'communist threat' necessitated some form of interventionism to safeguard the viability of capitalism in the long term. International law and institutions as forces relatively autonomous from particularistic national or economic interests were particularly well-situated for performing this crucial function.

Therefore, state-building and the diffusion of free-market economy were at the core of the Mandates System. Through their interventions, the bureaucrats of both the League and colonial powers were changing the social fabric of the colonies and creating the conditions for independence. The Second World War accelerated this process and brought about independence much faster than any inter-war international lawyer or colonial administrator would ever imagine. In fact, during roughly the third quarter of the twentieth century (1955-1980) it seemed possible that the social forces released by this process of transformation would threaten the very foundations of the international legal system and its commitment to free-market economy. The following chapter focuses precisely on this unfulfilled destabilising potential of the decolonisation process and its interplay with international law.

Chapter 4: From decolonisation to the New International Economic Order: continuities and ruptures in international law

I fought the law, and the law won.

Sonny Curtis, The Cricketers, I Fought the Law

This chapter inquires how the international law of colonialism was transformed into contemporary international law. To do so, I scrutinise the period stretching across the first three post- Second World War decades, examining how international law was challenged and transformed by the decolonisation process. The process of decolonisation and the role of international law therein should be understood as closely linked to colonial international law and its transformative functions. More specifically, I argue that it was due to the relative success of the 'civilising mission', coupled with the universal reach of international law at the time, that the decolonisation process took the form of sovereign statehood, and not of other forms of communal co-existence. Extraterritoriality in the nineteenth century and the Mandate System of the League of Nations are just two instances of international law and institutions altering social reality, privileging state-centralisation and capitalist relations of production.[1] Thus, when the question of decolonisation arose, international law and institutions had shaped material conditions in the colonies in such ways that rendered national statehood the option that corresponded better to these new social realities. Shortly after their independence, post-colonial states initiated a campaign that came to be known as the New International Economic Order (NIEO), pushing for reforms of international law in order to achieve economic sovereignty and development.[2] For them, economic sovereignty and development were the necessary corollaries to political independence, and NIEO was seen as a means to correct the injustices of the past. In the context of this process, the Third World challenged the hierarchy between states as it arose from colonialism and demanded the restructuring of the global legal and economic order. However, NIEO did not challenge the process of social transformation towards state-formation and certain forms of capitalism linked to colonialism and to the international law of the time. The prioritisation of 'state rights' as a means for advocating for international economic justice was interlinked with the unwillingness of post-colonial states to address the question of class divisions and domestic structures of power. On the legal level, the endorsement of certain core concepts of international law (sovereign statehood, consent as the

[1] See Chapters 2 and 3 of the present thesis.

[2] For the growing scholarly interest in the first post-war decades, decolonisation and international law see: S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2013); M. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 International and Comparative Law Quarterly 31; L. Eslava, M. Fakhri and V. Nesiah, (eds), *Bandung, the Global South, and International Law: Critical Pasts and Pending Futures* (CUP, 2016) (forthcoming). In spring 2015 the US-based journal Humanity devoted a special issue to the New International Economic Order, indicating the growing interest in the topic.

basis of international obligation) trapped the proponents of NIEO into the well-known oscillation between apology (state sovereignty) and utopia (international community) described by Martti Koskenniemi.[3] These antinomies, coupled with unfavourable political circumstances, led to the defeat of NIEO.

This chapter is structured as follows: Section 1 revisits the history of decolonisation, mapping how international law profoundly influenced its course, both by having transformed colonial societies during the nineteenth century and by providing a conceptual framework for what it means to be 'post-colonial'. Section 2 provides a brief account of the main axes of NIEO, focusing on its commitment to international law and the centrality of the concept of 'development'. Section 3 analyses the reasons for NIEO's failure. The argument put forward here is that NIEO's reformist agenda was too narrow, accepting core tenets of international law and trying to utilise them mostly for the benefit of post-colonial elites. As an initiative, therefore, NIEO was thus confronted with inherent contradictions of international law. Simultaneously, its silence about domestic arrangements and patterns of exploitation and injustice enabled its opponents to label it as 'nationalist' and defeat it politically through the promotion of legal concepts and techniques, like the World Bank's 'basic needs' or human rights, that claimed to be addressing issues of domestic patterns of power.

4:1 Decolonisation as homeopathy: the limitations of a revolution

When studying the history of decolonisation, we are confronted with a fundamental, yet infrequently asked question: why did the decolonisation process proceed through the proliferation of the form of sovereign statehood? To rephrase: why did being anti- and post-colonial eventually come to require the form of a nation-state, and not, for example, a return to pre-colonial forms of political organisation or transnational forms of political organisation, pan-Arabism, pan-Islamism or pan-Africanism being some examples? It is not as if these options were never contemplated, or that the question constitutes a purely intellectual exercise. As Lal points out:

> [i]n 1960, the Tanganyika African National Union (TANU), which went on to become the country's ruling political party, offered to "postpone the celebration of Tanganyika's independence", which was then scheduled for the following year, to "celebrate East Africa's independence in 1962 rather than take the risk of perpetuating the balkanization of East Africa."[4]

Similarly, as Cooper has argued, decolonisation was 'a drama of competing visions'[5].Plans for federalism between both (former) colonies or between them and the imperial centre were vividly

[3] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005).

[4] P. Lal, 'African Socialism and the Limits of Global Familyhood: Tanzania and the New International Economic Order in Sub-Saharan Africa' (2015) 6 Humanity 17, 20.

[5] F. Cooper, 'Possibility and Constraint: African Independence in Historical Perspective' (2008) 49 Journal of African History 167, 176.

debated in Francophone Africa and were even realised for a brief period in the case of Union française.[6] Fanon, who emerged as one of the major figures of post-colonial theory and exerted significant influence on the Algerian War of Independence, was sceptical about the limitations of nationalism as an emancipatory project,[7] and in 1961 he launched a comprehensive attack against what he saw as post-colonial elites' willingness to mimic European institutions, including national-statehood:

> So, comrades, let us not pay tribute to Europe by creating states, institutions and societies that draw their inspiration from her. Humanity is waiting for something other from us than such an imitation, which would be almost an obscene caricature. If we want to turn Africa into a new Europe, and America into a new Europe, then let us leave the destiny of our countries to Europeans. They will know how to do it better than the most gifted among us.[8]

However impassioned or creative as the alternatives might have been, national-statehood ultimately prevailed.[9] So far, the most comprehensive framework for comprehending the significance of international law in this process and in the eventual triumph of statehood as *the* form post/anti-colonialism assumed has been provided by Sundhya Pahuja in her Derrida- inspired account of the potential and limits of international law.[10] For her, the significance of international law in the process of decolonisation is both overestimated and underestimated.[11] It is overestimated to the extent that a *post-factum* mythology attributes the dissolution of formal empires to the UN Charter (the Charter hereafter) and the Universal Declaration of Human Rights (UDHR). In fact, neither of these documents dictated the end of the colonial project. The UDHR urged for the enjoyment of human rights without distinction 'on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, *trust, non-self-governing or under any other limitation of sovereignty*'.[12] Hence, colonialism and other forms of foreign domination were not denounced; nor were they conceptualised as violations of rights as such, but

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[6] Cooper elaborates this argument further: F. Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa: 1945–1960* (Columbia University Press, 2014).

[7] 'The objective of nationalist parties as from a certain given period is, we have seen, strictly national. […] When such parties are questioned on the economic programme of the state that they are clamouring for, or on the nature of the regime which they propose to install, they are incapable of replying, because precisely, they are completely ignorant of the economy of their country.' F. Fanon, *The Wretched of the Earth* (Penguin Books, 1990), 121.

[8] Ibid., 254.

[9] 'Although decolonization ultimately produced an assortment of new nation-states, this outcome was not actually conclusive until the late 1960s.' Lal (*supra* note 4).

[10] Pahuja (*supra* note 2).

[11] Ibid., 45.

[12] UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) UN Doc A/RES/217(III) A, Article 2 (emphasis added).

rather as 'neutral' backgrounds for the enjoyment of such rights. Further, the Charter included certain references to 'self-determination', which was conceptualised as a principle and not as a right.[13] Moreover, Article 77 practically exempted the Allies' colonies from the trusteeship system, making their inclusion voluntary.[14] In fact, France and the UK staunchly resisted any attempt to include their colonies in their trusteeship system by invoking the principle of non-interference in states' domestic affairs.[15] In San Francisco, France articulated an indirect, but clear, defence of its colonial enterprise: 'France recognized the value of a trusteeship system, but remarked that it was not the only way of promoting the development of dependent peoples.'[16] Therefore, one of the most controversial topics of the negotiation process for Article 77[17] was resolved in favour of imperial powers. Crucially, the UN Charter did not commit itself to the foreseeable independence of colonies. Independence was not explicitly mentioned as the ultimate goal regarding non-governing territories in general. With regard to the trusteeship system, independence was mentioned as one possible alternative outcome, along with self-government, a choice signalling no substantial progress regarding its interwar counterpart.[18]

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[13] Article 2 para 1 of the Charter states that one of the purposes of the UN is: '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace', while the introductory sentence of Article 55 reads as follows: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…' Charter of the United Nations (signed 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI. Crawford characterised these references as 'cryptic', a rather generous interpretation: J. Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2006), 112.

[14] Article 77 para 1 of the Charter stipulated that '[t]he trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a. territories now held under mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration.' UN Charter (*supra* note 13).

[15] Documents of the United Nations Conference on International Organization (UNCIO), San Francisco, 1945, Volume X (United Nations International Organization, 1945) 433, 440.

[16] Ibid., 433.

[17] The delegate of Australia summarised the importance of the disagreement as follows: 'The principal issue before this Committee, in his opinion, was whether the application of the trusteeship system to territories other than League Mandates and ex-enemy dependencies should be left to voluntary action of the powers responsible for their administration. In the Australian view, a merely voluntary procedure was inadequate.' Ibid., 428-429.

[18] Article 73 section b imposed upon states administering non self-governing territories the obligation 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'. Article 73 UN Charter (*supra* note 13). Article 76 section b set the goals of trusteeship administration as follows: 'The basic objectives of the

Again, the role of the two major colonial powers of the time, France and the UK, was crucial in undermining any effort to promote independence as the sole ultimate goal of the trusteeship system. It is telling that the UK 'warned the Committee against confusing independence with liberty. What the dependent peoples wanted was an increasing measure of self-government; independence would come, if at all, by natural development.'[19]

What was perhaps more promising in comparison to the Mandate System was that the Trusteeship Council was not comprised of civil servants but of representatives of UN member states, 'thus politicizing empire, putting the colonial powers in the minority, and increasing the likelihood of extensive public discussion of their policies'.[20] Nonetheless, one could argue that there was nothing fundamentally anti-imperialist and anti-colonialist about the basic post-war international legal documents. Rather, they reflected a delicate balance of power between the will of European powers to maintain their empires, American antipathy towards overt imperialism and the worry that rapid, uncontrolled decolonisation would make available space for the expansion of the USSR and, more broadly, socialism and communism. The tensions were clear in the drafting process of the Charter. On the one hand, the representative of the USSR 'emphasized the importance of independence'[21] for entrusted territories, and the Philippines invoked the war effort against Nazism and fascism in order to legitimise colonised peoples' demands for self-determination.[22] On the other hand, the UK rejected the idea of independence, at least as a general prescription, and insisted that decisions should be made on a case-by-case basis.[23] In any case, even proponents of independence believed it was 'a distant prospect'.[24]

In this sense, it is difficult to argue that the UN Charter and the international legal order that emerged in the immediate aftermath of the Second World War were inherently anti-imperial. Nonetheless, according to Pahuja, international law deeply marked the course decolonisation took by providing the vocabulary and conceptual tools for colonial peoples to articulate their aspirations and to render them

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trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement'. Article 76 ibid.

[19] UNCIO (*supra* note 15), 440.

[20] M. Mazower, *Governing the World: The History of an Idea* (Penguin Books, 2012), 253.

[21] UNCIO (*supra* note 15), 441.

[22] 'Peoples all over the world have been given new hope of freedom by this war, and this hope should not be disappointed.' Ibid., 562.

[23] Ibid.

[24] Ibid., 453.

intelligible to the international arena, be it political or legal. In Pahuja's words, international law 'was already the universal juridical frame covering the globe. This coverage meant that international law could provide a structure by which the heterogeneous movements for decolonisation could be smoothed into a coherent story'[25] and 'be contained within the broader frameworks set by Western interests'.[26] Thus, on one hand, whilst international law did provide a language in which claims for decolonisation could gain a certain audibility, on the other, it locked in 'nation-statehood' as the only way to claim legal personality.[27]Thus, both the universal reach and the claim to universality of international law provided a framework for decolonisation to take place, while defining the limits of this process at the same time.

Though instructive, Pahuja's argument overestates the discursive power of international law and underestimates its material implications. In order to grasp the role of international law in the decolonisation process, we need to consider how, through international law, colonialism changed the social, economic and political fabric of colonised societies. The principal argument laid out in previous chapters is key for this argument. First, the social and economic reforms introduced by administrating powers, whether these were outright colonisers, trustees under the Mandate system or imperial powers in relation to semi-colonies, such as Japan or the Ottoman Empire during the nineteenth century, promoted the transformation of colonial societies into centralised capitalist states.[28] Arguably, the efficacy of this process varied greatly, depending on domestic conditions, the balance of social forces and the refinement of the policies applied. Whether through treaties or through the international administration of territories, international law assumed a proactive role in the transformation of colonial polities into centralised nation-states with capitalist economies. The dissolution of traditional modes of producing and living, and the gradual centralisation of power promoted by colonial international law, enabled the emergence of sovereignty as the hegemonic form of post-colonial communal organisation. Hence, sovereign statehood, far from being a self-evident truth or purely a discursive strategy, was in fact the very outcome of colonial social engineering, and international law had played a significant role in this process. In that sense, and in a very contradictory manner, international law of the nineteenth century was unintentionally paving the way for its own collapse. By pushing towards the legalisation of social relations, state centralisation, the creation of a (national) bureaucracy or even of national armies, colonial international law was creating the conditions that rendered it illegitimate and led to its demise. Simultaneously, the spread of a free-market economy through international law created a national bourgeoisie that, despite its relevant

[25] Pahuja (*supra* note 2), 45.

[26] Ibid.

[27] Ibid.

[28] See Chapters 2 and 3 of this thesis.

weakness, would effectively restrain efforts to transform anti-colonial struggles into comprehensive programmes of social liberation.[29]

On an international legal level, this reality was reflected by the principle of *uti possidetis juris*.[30] Despite its largely mythological links to Roman law, the principle was first applied in the decolonisation of Latin America[31] and was mobilised a century later in the context of decolonisation in Africa and Southeast Asia, as well as in the process of the disintegration of Yugoslavia at the turn of the twentieth century.[32] The most common justification for the principle is that it safeguards territorial and border stability in the face of the largely cataclysmic events of decolonisation, or of state succession more broadly.[33] This is undeniably true; however, the functions of the *uti possidetis* doctrine are more systemic than that. Apart from protecting already existing borders, *uti possidetis* protects and entrenches the very idea of borders and of nation-states as fundamentally territorialised political communities. As Malcolm Shaw argues, through the application of the *uti possidetis* principle, '[s]elf-determination, therefore, ensured the distinct identity of the colony and its decolonization, but on the basis of accepting the existence of a discrete territorial unit in international

[29] 'Ironically, it was African elites who sanctified the colonial state by ratifying its borders and forbidding even idle speculation about reconsideration of the issue. […] Even today, with overwhelming empirical evidence of the failure of the post-colonial state, African elites insist on clinging to this fiction of European creation to the bitter end.' M. w. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995)16 Michigan Journal of International Law 1113, 1119.

[30] '[T]he principle is not a special rule which pertains solely to one specific system of international law, it is a general principle, which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.' *Case Concerning the Frontier Dispute (Burkina Faso v The Republic of Mali)* (Judgment) [1986] ICJ Rep 554, para 20.

[31] 'In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State.' Ibid.

[32] 'Except where otherwise agreed, the former boundaries became frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*.' Conference on Yugoslavia, Arbitration Commission Badinter Opinion No. 3 (11 January 1992).

[33] 'Reliance on *uti possidetis* during the post-Cold War break-ups has stemmed from three arguments or assumptions. First, *uti possidetis* reduces the prospects of armed conflict by providing the only clear outcome in such situations. Absent such a policy, all borders would be open to dispute, and new states would fall prey to irredentist neighbors or internal secessionist claimants.' S. R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 American Journal of International Law 590, 591.

law'.[34] In that sense, *uti possidetis* was drawing from the legacies of colonial international law, while consolidating them at the same time.

It is a common trope that the boundaries that arose from this process were artificial.[35] This is true to the extent that they did not correspond to the needs of the post-colonial peoples, especially the most oppressed and marginalised ones. However, it is difficult to argue that, for example, European boundaries were less artificial or less oppressive and unstable. Relative stability and (temporary) homogeneity only occurred in Europe after centuries of armed conflict and, crucially, after the *de facto* resolution of the 'minority problem' during the 1930s and 1940s with the large-scale expulsion and – alas – extermination of entire populations.[36] Therefore, the idea that *uti possidetis* prevented the emergence of more 'natural' and therefore functional borders is unsustainable. Nonetheless, the principle can and should be criticised on the basis that it consolidated national-statehood as the only materially viable, politically acceptable and legally feasible form of post-colonial political organisation. Furthermore, *uti possidetis* entrenched the continuities between colonial and post-colonial international law. In the course of the colonial encounter, international law would promote or encourage state-centralisation through the construction of railways or other infrastructure, through the (piecemeal and problematic) dissolution of traditional relations of production and of social organisation and through their replacement with (precarious) bureaucratic structures and free markets. *Uti possidetis* drew from this material reality, while simultaneously consolidating it. Thus, international law was not only or even primarily a discursive strategy providing a language that legitimised, but also limited, anti-colonial struggles. International law of the nineteenth century was part of a wider trend of social transformation that entailed state centralisation and the diffusion of capitalism outside the West. However, it was this very process of social transformation that brought about the rise of the social forces that brought formal colonialism and formal imperialism to an end. In a fine dialectical move, colonial international law, with its formal hierarchies between civilised and

[34] M. N. Shaw, 'Peoples, Territorialism and Boundaries' (1997) 3 European Journal of International Law 478, 481.

[35] 'Unlike their European counterparts, African states and borders are distinctly artificial and are not "the visible expression of the age-long efforts of [the indigenous] peoples to achieve political adjustment between themselves and the physical conditions in which they live."' Mutua, (*supra* note 29), 1115.

[36] Mazower has neatly summarised the decline of the faith in international law as a tool for managing the problem of minorities in Europe, and the rise of much more radical solutions, such as population transfers, during the 1930s and 1940s in an ideological climate that paved the way for Nazi atrocities: 'Nations, Refugees, and Territory: The Jews and the Lessons of the Nazi New Order' in M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009). For population exchanges that consolidated national identities and the role of international law and institutions: U. Özsu, *Formalizing Displacement: International Law and Population Transfers* (OUP, 2014).

not-so-civilised states, collapses under the burden of the world it helped create. With the same dialectical move, though, international law set the limits for this emerging world. The form decolonisation assumed was that of the centralised, bureaucratic nation-state with some form of capitalist economy. Undeniably, certain post-colonial states, such as Algeria or Tanzania, struggled against this heritage and experimented with forms of 'African socialism'. However, to the extent that they did so, they were fighting against both existing norms of international law and the legacies of colonial international law in the fabric of their societies.

4:2 From politics to economics: a sense of incompleteness and the quest for a just international legal order

This section summarises the attempt of post-colonial states to reform the international legal order in the course of the first three post-war decades. This reformist programme, commonly known as the New International Economic Order (NIEO), was formally launched in 1974, but its origins date back to the 1950s and 1960s, and Latin American states' initiatives to promote national sovereignty over natural resources.[37] For the purposes of this chapter, NIEO is used to signify the broader process of Third World states' engagement with international law before the 1980s. The reform agenda of NIEO included demands, such as the absolute right of states to control their natural resources, the establishment and recognition of state-managed resource cartels to stabilise (and raise) commodity prices, the regulation of transnational corporations, technology transfers from North to South, the granting of preferential (nonreciprocal) trade preferences from the Global North to the Global South, and debt forgiveness.[38] To begin with, I will argue three points: first, I shall outline the contradictory engagement of post-colonial states with law, which was understood by them as both an oppressive and emancipatory structure. Secondly, I will comment on how the Third World was confronted with the reality that political independence was not sufficient to safeguard their economic autonomy and well-being and henceforth, resorted to the concept of 'development' to address this problem. Finally, I will provide a short overview of the main legal reforms promoted under the NIEO umbrella, before moving on to critiquing them.

[37] UNGA, 'Right to Explore Freely Natural Wealth and Resources' (21 December 1952) UN Doc A/RES/626(VII); UNGA, 'Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination' (12 December 1958) UN Doc A/RES/1314(XIII); UNGA, 'Declaration on Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/RES/1803(XVII). For the most comprehensive account of the concept so far, see: N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP, 1997). For a contemporary account that also links this move to the NIEO, see: U. Özsu, 'Rendering Sovereignty Permanent? The Multiple Legacies of the New International Economic Order' (2016) European Yearbook of International Economic Law (forthcoming).

[38] N. Gilman, 'The New International Economic Order: A Reintroduction' (2015) Humanity 1, 3.

4:2:1 NIEO as a legal project: saving international law from itself?

The contradictory sentiments felt in the Third World *vis-à-vis* international law lay at the heart of NIEO. This can be seen clearly in the interventions of Mohammed Bedjaoui, the Algerian jurist who was one of the major NIEO figures in the international legal realm. In his 1979 book on the subject,[39] Bedjaoui stressed the complicity of international law with the colonial project, asserting that it had functioned historically as an 'international law of appropriation'.[40] Even more so, he perceived the discipline as plutocratic, oligarchic and non-interventionist in the economic domain, claiming that '[a] permissive, liberal, indifferent law can only be a law for the benefit of the industrialised countries'.[41] More specifically, Bedjaoui focused his criticism on legal formalism, or 'legal paganism', as he chose to summarise what he saw as a fixation on legal form and a neglect of underlying facts that served to render a formally neutral norm socially unjust.[42] The focus of his criticism also allowed him to justify his choice to engage heavily with international law in the quest of a fairer international society.[43] If we read his argument closely, a dichotomy arises between international law as such (the 'true nature' of IL) and its 'real function', the former being genuinely progressive, while the latter, being formalist, giving IL a regressive function.[44] In a sense, he advocated for the salvation of international law from (Western) international lawyers, a process capable of revealing the presumed progressive essence of international law. He was not alone in this quest. Many international lawyers from the periphery, such as Georges Abi-Saab or Prakash Sinha, engaged in critiques of international law, only to go on and reassure their readers that this critique does not imply a rejection, but rather a profound commitment to international law.[45] Interestingly, this (anti-formalist) critique of international law frequently resulted in challenging international custom, which was perceived as particularly detrimental to the

[39] M. Bedjaoui, *Towards a New International Economic Order* (UNESCO/Holmes & Meier, 1979). For a concise overview of Bedjaoui's arguments, see: U. Özsu '"In the interests of humankind as a whole": Mohammed Bedjaoui's New International Economic Order' (2015) 6 Humanity 129.

[40] Bedjaoui, (*supra* note 39), 12.

[41] Ibid., 61.

[42] Ibid., 98.

[43] Bedjaoui himself acknowledged that there was a 'seeming paradox' in using law, which he had described as a conservative - if not reactionary - force, to bring about change. Ibid., 110.

[44] Ibid., 112.

[45] See: G. A. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 Howard Law Journal 95, 100; P. Sinha, (1965) 'Perspective of the Newly Independent States on the Binding Quality of International Law' 14 International and Comparative Law Quarterly 121, 121. Knox has argued convincingly that Sinha was a prominent representative of the conservative understanding of colonialism in international legal scholarship: R. Knox, 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law' (PhD thesis, LSE 2014), 100.

interests of Third World states, on the most formalist ground one could possibly imagine: the lack of consent on the part of Third World states.[46]

Setting this contradiction aside for a moment, it needs to be observed that post-colonial states' positive attitude for international law in general, and distrust towards its contemporary state, were reflected in their sustained efforts for reform. Given that voting rules in the Bretton Woods Institutions (BWIs) were fundamentally inimical for them,[47] Third World states turned to the UN General Assembly and other UN institutions (for example, the UN Conference on Trade and Development, UNCTAD), in order to promote their international legal agenda. After 1952,[48] and especially after 1974, Third World states passed numerous resolutions[49] and established multiple committees under the auspices of the UN[50] with a view of reforming international law. We will turn to the details of these efforts shortly. What is of interest here is that this choice was dictated by pragmatic considerations, to the extent that this was the only forum that enabled the Third World to form a majority and have its voice heard. The successful campaign of India against South Africa's discriminatory laws against Indian migrants had persuaded the states of the Third World that the UN

[46] 'These new States cannot be expected to accept the thesis that practice of a norm by a group of States may create rules binding upon all States, that, as one scholar argued, international law is based on the "decision of the overwhelming force in the international community." For not all the rules of customary international law are acceptable to them.' Sinha (*supra* note 45), 122. Accordingly, in his seminal work Bedjaoui praised the USSR for challenging the rules of state succession and thus, paved the way for 'the gradual elaboration of a voluntary international law.' Bedjaoui (*supra* note 39), 58.

[47] Post-colonial states attempted to rectify this perceived injustice in Article 10 of the Charter of Economic Rights: 'All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, inter alia, through the appropriate international organizations in accordance with their existing and evolving rules, and to share the benefits resulting therefrom.' Article 10 UNGA, Charter of Economic Rights and Duties of States (12 December 1974) UN Doc A/RES/29/3281. For the increasingly hostile position of the World Bank *vis-à-vis* NIEO, see: P. Sharma 'Between North and South: The World Bank and the New International Economic Order' (2015) 6 Humanity 189.

[48] In 1952, the General Assembly requested the Commission on Human Rights to prepare recommendations concerning international respect for the right of peoples to self-determination: UNGA, 'The Right of Peoples and Nations to Self-determination' (16 December 1952) UN Doc A/RES/637.

[49] The three most significant being: UNGA, 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) UN Doc. A/Res/S-6/3201; UNGA, 'Programme of Action on the Establishment of a New International Economic Order' (1 May 1974) UN Doc. A/Res/S-6/3202; the Charter of Economic Rights (*supra* note 37).

[50] Amongst the more prominent were the Commission on Transnational Corporations, the United Nations Center on Transnational Corporations, and the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology.

was not a mere rerun of the League of Nations and that they could utilise its structures for their struggle against imperialism.[51] Nevertheless, the fact that UNGA Resolutions are generally not binding under international law[52] posed significant obstacles to this process.

Post-colonial states and theorists adopted different strategies to confront this problem. Amongst the most ambitious arguments are Falk's assertion that, under certain conditions, the UNGA enjoyed quasi-legislative powers, and Bulajić's suggestion that when a few (Western) states are blocking a legislative process, it should be international consensus and not consent that forms the basis of obligation in the international community.[53] It follows that NIEO was quickly confronted with questions related to the sources of international law and even more fundamentally the basis of international legal obligation.[54] Admittedly, the reformist efforts of the Third World exceeded the limits of the UN achieving certain modest, and occasionally temporary, victories in fora such as the GATT[55] or UNCLOS[56], while it was due to their persistent efforts that the right to self-determination was introduced in common Article 1 of the ICCPR and the ICESC.[57]

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[51] In relation to India's successful resolutions, Mazower observed that: '[t]he emergence in the General Assembly of an entirely new conception of world order - one premised on the breakup of empire rather than its continuation, on politics rather than law - was no figment of the imagination. The General Assembly itself had proved more unpredictable than the drafters of the UN Charter had anticipated. And, for a time, it was more powerful too.' Mazower (*supra* note 36), 185.

[52] See generally Articles 10 and 14 of the UN Charter. At San Francisco, the Philippines suggested that the UNGA should be vested with legislative power, a proposal defeated 26-1.

[53] R.A Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 American Journal of International Law 782; M. Bulajić, 'Legal Aspects of a New International Economic Order' in K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (Frances Pinter/Nichols Publishing Company, 1980), 60.

[54] Falk admitted this and implied directly that Article 38 of the ICJ should not be considered an exhaustive enumeration of the sources of international law. Falk (*supra* note 53), 782.

[55] The GATT was fundamentally averse to the reformist aspirations of the Third World. Nevertheless, Article XXXVI of Part IV of the GATT was considered a significant success of the post-colonial states deviating from the rule of reciprocity. Furthermore, the Tokyo Round concluded an 'enabling clause' that enabled - but did not require - preferential treatment to 'developing countries'. See: Tokyo Round 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' LT/TR/D/1 (28 November 1979).

[56] Article 136 of UNCLOS designated the resources of the deep seabed as the 'common heritage' of humankind: 1982 United Nations Convention on the Law of the Sea (UNCLOS) 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261 (1982) Article 136. This provision was the outcome of poorer states' insistence and according to Salomon 'instilled in international law a scheme or distributive economic justice', in Salomon (*supra* note 2), 45. It is generally understood that the 1994 Implementation Agreement, despite its title, eventually dismantled the

In any case, their insistence on bringing about change to the fabric of international law using conventional (treaties) and less conventional (UNGA Resolutions) methods reveals the commitment of post-colonial states to international law, which they otherwise thought was complicit in, if not directly responsible for, the colonial project. This was not a self-evident strategy. For example, the USSR before the Second World War—and certainly in its 'revolutionary' phase in the 1920s—engaged with international law in a profoundly different way at first, denouncing it as a bourgeois construct.[58] It was only once the USSR had established its position in the international realm that Soviet lawyers began to advocate for the co-existence of two distinct international legal systems, one between socialist states, and one between socialist and capitalist states.[59] The Third World consciously did not follow this path and remained committed to legal universalism.[60] This observation does not imply that the Soviet strategy was necessarily 'better' or more radical than NIEO. It just seeks to point out that the choice to embrace international law and the struggle to reform it, in order to reveal its anticipated emancipatory core, were neither obvious nor inevitable, especially in the course of a process as disruptive and revolutionary as decolonisation.

4:2:2 Building a coherent narrative: development as a legal strategy

The previous sub-section showed that NIEO was a project both critical of and devoted to international law and how this is already something which is of note. In this section, I will discuss the strategy of the state elites promoting NIEO to build a coherent narrative about what kind of reform they sought to

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regime, promoting a free-market approach to the exploitation of the deep seabed: Agreement Related to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, entered into force on 28 July 1996 UNTS 1836, No I-31364; ILM 33.

[57] International Covenant of Civil and Political Rights (ICCPR), signed 16 December 1966, entered into force 23 March 1976, UNTS 999/171, International Covenant of Economic, Social and Cultural Rights (ICESCR), signed 16 December 1966, entered into force 3 January 1976, UNTS 993/3.

[58] The contrast here is stark to the extent, for example, that Third World states did not challenge that compensation was payable in the event of nationalisation of property, but negotiated the level of compensation, and importantly, which law (national or international) was applicable in these cases. On the other hand, the Bolsheviks nationalised property without any form of compensation and without emphasising the international legality of their acts as much as was done through NIEO.

[59] See generally: G.I Tunkin, *International Law: A Textbook* (Progress Publishers, 1986).

[60] 'The NIEO's central claims were clothed in a particularly effusive form of universalism, one that would inaugurate a new, generously ''social'' conception of international affairs while doing away with the last vestiges of nineteenth- and early twentieth-century classical international law.' Özsu (*supra* note 39), 129.

bring about. As others before me,[61] I will argue that the main concept that was brought into play, in order to unify varying and often contradictory legal claims, was that of *development*. As part of this sub-section, it is also argued that the concept of development represented the internalisation of significant aspects of the capitalist and imperialist hegemony over international law, thus posing limits to the transformative potential of NIEO.

As has already been hinted, NIEO advocates, be they states or lawyers, advanced arguments that were essentially contradictory: they called for both more and less state sovereignty, for enhanced state independence and extensive communitarian co-operation, and all at the same time. What unified those claims, arguably easing the tensions among them, was the conviction that international law should basically be devoted to one thing: the economic development of the Third World. Of course, development as a concept was not a novelty of NIEO.[62] The concept first appeared in an international legal document in Article 22 of the League Covenant,[63] and it gained prominence after being elevated in Point Four of Truman's Inaugural Address in 1949: '[f]ourth, we must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas'.[64] Emphasising development had the advantage that it could be anchored in the UN Charter, which, in Articles 1 para 3 and 55 (a) embraces development and the wider promotion of socio-economic issues as purposes of the UN.[65]

[61] Amongst many: A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005); E. Tourme-Jouannet, *What is a Fair International Society?: International Law between Development and Recognition* (Hart Publishing, 2013); Pahuja (*supra* note 2).

[62] For a comprehensive critique of the concept, see: G. Rist, *The History of Development: From Western Origins to Global Faith* (4th edn, Zed Books, 2014). For a detailed commentary on the growing bibliography on development, see: J. Morgan Hodge, 'Writing the History of Development: Part 1: The First Wave' (2015) 6 Humanity 429; J. Morgan Hodge, 'Writing the History of Development: Part 2: Longer, Deeper, Wider' (2016) 7 Humanity 125.

[63] 'To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.' Covenant of the League of Nations (adopted 29 April 1919, entered into force 10 January 1920), [1919] UKTS 4 (Cmd. 153)/ [1920] ATS 1/ [1920] ATS 3, Article 22, para 1.

[64] *Public Papers of the Presidents of the United States*, Harry S. Truman, Year 1949 (United States Government Printing Office, 1964), 114.

[65] Article 1 para 3 reads as follows: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'; Article 55

Interestingly, for what was to follow, it was Western states that advocated for the inclusion of these clauses, whereas the USSR was very sceptical, arguing that they could serve as excuses for interference with the domestic affairs of states.[66] That said, development was elevated to the main objective of decolonisation and subsequent attempted reforms from early on. In 1960, the UNGA Resolution 'Declaration on the Granting of Independence to Colonial Countries and Peoples' denounced colonialism, also on the basis of it impeding 'the social, cultural and economic development of dependent peoples'.[67] Hence, development was designated as the undisputable objective of all peoples and colonialism was understood as hindering this development, and not, for example, as promoting a specific form of development (capitalist development) or, even more broadly, as manufacturing societies where 'development' is elevated to the highest social goal. This trend went on, and Resolution 1710 confirmed the centrality of development for post-colonial states. Even more crucially, it elevated economic growth into the cornerstone of development, setting specific growth targets for the 'developing states', which, if achieved, were understood as resolving those states' pressing social issues.[68] Finally, a brief discourse analysis of the three core NIEO resolutions reveals the centrality of development in the thought of Third World elites. In the *Declaration on the Establishment of a New International Economic Order*,[69] words related to development ('development', 'developing/ developed/least developed countries', 'growth', 'acceleration', 'industrialisation')[70] appear thirty times in the space of two pages. In the *Charter of Economic Rights*,[71] the respective number is above 100, and in the slightly longer *Programme of Action* (approximately 15 pages), we can detect almost 200 relevant references.[72] This legacy survives

(a) stipulates that: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development', UN Charter (*supra* note 13).

[66] Tourme-Jouannet (*supra* note 61), 9.

[67] Declaration on the Granting of Independence to Colonial Countries and Peoples UNGA Res 1514 (XV) UN Docs A/RES/1514 (1960) Preamble.

[68] '[A]ccelerate progress towards self-sustaining growth of the economy of individual nations and their social advancement so as to attain in each under-developed country a substantial increase in the rate of growth, with each country setting its own target, taking as an objective an annual minimum rate of growth of aggregate national income of 5 per cent at the end of the Decade;' United Nations Development Decade UNGA Res. 1710 (XVI) UN Doc. A/RES/1710 (1961) Article 1.

[69] Declaration on the Establishment (*supra* note 49).

[70] Words like 'rationality' or 'technology' were not included in the word count, even though they are closely associated to the concept of development. Similarly, the word count did not include words connoting the 'gap' between rich and poor countries, since these are also linked to the concept of (inter-state) inequality.

[71] Charter of Economic Rights (*supra* note 47).

[72] Programme of Action (*supra* note 49).

even today, since leading Third World international lawyers remain favourable towards (capitalist) development, even when challenging its specific modalities.[73]

This commitment was reflected aptly in (self)identifying the Third World as 'developing states'. Pahuja has argued convincingly that, in so doing, 'development' replaced theories of racial superiority and inferiority as the criterion that established a hierarchy between different political communities.[74] Core NIEO Resolutions confirm this assertion. To begin with, political independence and each people's right to choose their political and economic system, free from coercion, were repeatedly stressed during that period.[75] Nevertheless, the same documents constructed a very specific conception of economic and political organisation. Chapter 1 of the Charter of Economic Rights provides us with the best example thereof, arguing that international relations should aim to remedy the injustices of colonialism and restore a nation's natural resources so that a State's '*normal* development' could be achieved: 'Remedying the injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development'.[76] Combined with numerous statements in the context of NIEO which hail technological advancement and industrialisation as the appropriate modes of economic development, this provision signifies a normalisation of capitalist development. Throughout the core NIEO instruments, we encounter a historical narrative that divided different states in accordance with their level of development, which in turn was equated with industrialisation, technological advancement and economic growth. The 'historical destiny' of 'under-developed' or 'developing' states is to be elevated to the level of the 'developed' ones, which will both correct the injustices of colonialism and resolve their social problems.[77] Hence, even though the Third World advocated for freedom to choose their socio-political system, they implicitly adopted the idea that the international legal realm should be structured around the transformation of their societies into developed, capitalist economies. This is further evident in the means chosen to advance this goal. Post-colonial states generally embraced the liberalisation of world

[73] 'To be sure, the post-colonial era has witnessed the massive violation of human rights of ordinary peoples in the name of development. But it is a particular kind of development policies that are responsible for these violations and not development per se.' B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 2, 18.

[74] Pahuja (*supra* note 2), 63.

[75] 'The new international economic order should be founded on full respect for the following principles: … d. The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result.' Article 4 (d) Declaration on the Establishment (*supra* note 49).

[76] Article 1 (i) Charter of Economic Rights (*supra* note 47).

[77] See note 68 above.

trade,[78] which was closely associated in their rhetoric with an improvement in living standards, and their calls to receive beneficial treatment were seen as temporary until they could 'catch up' with the 'developed' states. Further, they insisted in the significance of foreign investment for achieving their goal.[79] Therefore, the insistence of the Third World on political independence was conditioned by its own vision about economic development, which constructed a rigid understanding of what is desirable in the economic sphere. Fanon publicly resented this desire to catch up: '[n]o, we do not want to catch up with anyone. […] It is a question of the Third World starting a new history of Man',[80] but NIEO was deeply invested in this mode of thinking.

To conclude, development was elevated to the principal goal and also shaped the narrative that provided NIEO with a degree of consistency and coherence. This approach had the advantage that it could be anchored in the Charter, and that it resonated with the economic 'common sense' of the time. On the one hand, development was traditionally one of the core Western beliefs associated with the concept of progress.[81] On the other hand, the USSR had embraced industrialisation as absolutely essential in building socialism,[82] while contemporary Marxism (over)emphasised underdevelopment as a consequence of capitalist imperialism.[83] Therefore, NIEO, challenging as it might have been, was also embedded in the economic and political orthodoxy of its time.

4:3 NIEO as failure: asking some fundamental questions

This section, in line with the many international lawyers,[84] argues that NIEO was politically and legally defeated and tracks this failure back in the early 1980s. NIEO's suggested reforms were

[78] Articles 2(h), 3(a)iii Programme of Action (note 49), Article 14 ibid.

[79] Article 22 ibid.

[80] Fanon (*supra* note 7), 254.

[81] 'Offering a confident bridge to a better and more stable future, modernization theory posited a stark dichotomy between traditional societies and modern ones. History was the passage from one kind of society to the other, a passage that all peoples would eventually make.' Mazower (*supra* note 20), 291.

[82] Lenin's famous quote that 'Communism is Soviet power plus the electrification of the whole country, since industry cannot be developed without electrification' summarises concisely the devotion of the USSR to industry and modernisation. V. I. Lenin, 'Our Foreign and Domestic Position and Party Tasks' in *Lenin's Collected Works* (4th English edn, Progress Publishers, 1965), Volume 31, 408-426.

[83] For an overview and a critique of Marxist dependency theories, see: J. Milios and D. P. Sotiropoulos, *Rethinking Imperialism: A Study of Capitalist Rule* (Palgrave, 2008).

[84] There is general agreement about the failure of NIEO between both its friends and its foes. Amongst many: the texts of NIEO 'have been long forgotten and many observers would probably regard them as politically quaint, economically barmy or the product of misguided economic nationalism.' J. Faundez, 'International Economic Law and Development before and after Neo-liberalism' in: J. Faundez and C. Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar Publishing, 2010), 17. Rajagopal begs

generally not implemented and, by the mid-1980s, the reformist block had disintegrated, meaning that co-ordinated efforts for reform in NIEO's direction ceased. What I will do here is to detect the reasons for this defeat, dividing them into legal and political ones. At the first level, it is argued that, since NIEO was a firmly international legal project, it ended up trapped in the very antinomies of international law. Following Koskenniemi, it will be argued that NIEO ended up oscillating between state sovereignty and the notion of international community, without being able to resolve this fundamental tension.[85] The problems here were even starker, given that the Third World was not just advancing an international legal argument, but was involved in a reform project. At a second level, it is maintained that this legal deadlock was symptomatic of deeper political tensions at the heart of NIEO. The proponents of NIEO created a historical narrative of colonialism and international law that emphasised the exploitation of the colonial territories. Simultaneously, their international legal proposals neglected almost totally what I argue here was the principal function of international law during colonialism: the guarantee of the transformation of the colonies into capitalist societies, even to the detriment of colonial powers. Therefore, the leaders of NIEO criticised international law from an essentially left-wing liberal perspective;[86] it was this adoption of liberalism that brought about the legal antinomies mentioned above. This political choice, combined with a series of contemporary political limitations, contributed to the failure of NIEO, and in turn paved the way for the rise of neoliberalism as the hegemonic international legal ideology.

4:3:1 NIEO's oscillation: from permanent sovereignty to 'common heritage of mankind'

In his contribution on international law and free trade, Stephen Neff, who is not among the keenest supporters of NIEO, conceptualised it as a manifestation of Third World economic nationalism.[87] Simultaneously, the USA would not ratify UNCLOS, as it objected to Article 136 and its designation of the deep seabed as a 'common heritage of mankind' on the basis that it was a form of 'international socialism'.[88] Who was right? Was NIEO a nationalist project that failed to acknowledge the

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to differ: B. Rajagopal, *International Law from Below Development, Social Movements and Third World Resistance* (CUP, 2003), 73.

[85] Koskenniemi (*supra* note 3), 485-488.

[86] John Haskell has argued convincingly that left-wing liberalism is nowadays the dominant ideology within TWAIL: J. D. Haskell, 'The TWAIL Paradox'(2014) 1 RGNUL Finance and Mercantile Law Review, 104

[87] 'This proposed "new international economic order" is anything but new. From the economic standpoint, it is quite clearly rooted in nineteenth-century economic nationalism. From the legal standpoint, too, it is thoroughly traditional.' S. C. Neff, *Friends but no Allies: Economic Liberalism and the Law of Nation*s (Columbia University Press, 1990), 179. Despite this being the principal line of criticism Neff advances, he also asserts that NIEO was an attempt to establish 'a global welfare state', a claim which appears to contradict his first approach. Ibid., 189.

[88] 'The main focus of concern was the ISA, which was to be financed by United Nations funds and was seen by the US administration in 1982 as especially designed to propagate international socialism and monopolistic

interconnectedness of the global economy and sought to promote the particularistic interests of the Third World, or was it a communitarian project advocating global solidarity?

The answer, paradoxical as it may sound, is that both critiques were at least partly accurate. As has already been suggested, NIEO was an international legal project that advanced fundamentally contradictory claims, oscillating between commitment to sovereignty and invocations of international community. Henceforth, post-colonial states rejected the claim that they were automatically bound by customary international law, contending that this argument violated their sovereign equality and forewent state consent as the basis of international legal obligation. For example, the Indian member of the International Law Commission, R.B. Pal, argued

> international law was no longer the almost exclusive preserve of the peoples of European blood, "by whose consent it exists and for the settlement of whose differences it is applied or at least invoked." Now that international law must be regarded as embracing other peoples, it clearly required their consent no less.[89]

Similar arguments were put forward in the debate surrounding the (dis)continuity of the international legal obligations of successor states.[90] State sovereignty over natural resources and the primacy of domestic over international law in the determination of the level of compensation in case of expropriation were also central for NIEO.[91] Therefore, at a certain level, NIEO was advocating for a traditionalist approach to international law, emphasising the extension of the principles of sovereign equality to non-Western states. The point that sovereignty was an achievement gained by the Third World through painful struggles, and therefore to be valued keenly, was raised regularly.[92]

Interestingly, the overall picture of NIEO as a legal project is far more complicated. As has already been stressed, the choice of post-colonial states to promote legal reform through the UNGA gave rise

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international bureaucracy and to serve the interests of developing States by promoting the so called "New Economic Order".' M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, 2005), 69.

[89] Quoted in: R. P Anand, 'Role of the "New" Asian-African Countries in the Present International Legal Order' (1962)56 American Journal of International Law 383, 388.

[90] For the most authoritative summary of the debate, see: M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP, 2007), 80-92.

[91] Declaration on Permanent Sovereignty over Natural Resources GA Res. 1803 (XVII) UN Docs A/RES/1803 (1962).

[92] 'For the newly independent states, sovereignty is the hard-won prize for their long struggle for emancipation. It is the legal epitome of the fact that they are masters in their own house. It is the legal shield against any further domination or intervention by stronger states. They are very aware of its existence and importance for, until recently, they were deprived of it.' Abi-Saab (*supra* note 45), 103. 'Sovereignty is the most treasured possession of the newly independent States.' Sinha (*supra* note 45), 127.

to the question of the normative effects of these resolutions.[93] In order to circumvent this problem, proponents of NIEO would resort to clearly communitarian arguments, emphasising how a few Western states could not possibly block these reforms.[94] For example, Castañeda argued that aid from developed to developing states ought to be conceptualised as a form of 'international tax',[95] a viewpoint that implies the existence of an international community with normative consequences akin to those of domestic communities and he stressed the need for a *legal* obligation to co-operate.[96] Eventually, Bedjaoui resorted to the communitarian argument *par excellence*: *jus cogens*. Bedjaoui argued that 'the right to development' should be recognised as a *jus cogens* norm since 'the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens*.'[97] The fundamental question is not about the correctness of this argument, but rather about its incompatibility with the rest of the claims advanced by NIEO proponents in general and Bedjaoui in particular. Here, the basis of international legal obligation appears to be the collective will of the international community as a whole, which is capable of overturning the will of individual states. However, this approach was rejected by post-colonial states in the debate about the binding character of customary law to newly founded states.[98] This ambivalence is evident in Abi-Saab's writings; having devoted pages to praise sovereignty, he went on to assert that '[v]oluntarism is not, however, very helpful because it is a double-edged weapon'.[99] In this respect, Abi-Saab pithily summarised the paradoxes and contradictions of the legal scholarship linked to NIEO.

In a nutshell, NIEO as a legal project got trapped between 'descending' and 'ascending' patterns of justification. In the arguments of its proponents, both the will of the state and international community are invoked as the basis of international legal obligation. Nevertheless, as Koskenniemi has convincingly argued, these arguments are 'meaningful only in mutual exclusion'.[100] NIEO was subjected to the imperative to be both concrete and normative.[101] In turn, that meant that it advanced an incoherent argument 'which constantly shifts between the opposing positions while remaining

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[93] Amongst many: M. Mendelson, 'The Legal Character of General Assembly Resolutions: Some Considerations of Principle', in Hossain (*supra* note 53), 95-107.

[94]See: Bulajić ibid.

[95] J. Castañeda, 'Introduction of the Law of International Economic Relations' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Nijhoff, 1991), 592.

[96] Ibid., 596.

[97] M. Bedjaoui 'The Right to Development' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Nijhoff, 1991), 1193.

[98] Castañeda (*supra* note 95).

[99] Abi-Saab (*supra* note 45), 103.

[100] Koskenniemi (*supra* note 3), 65.

[101] Ibid., 68.

open to challenge from the opposite argument'.[102] This is why the arguments against NIEO were as heterogeneous as depicted above. In fact, Koskenniemi identified NIEO as a typical example of the pre-determined failed projects promoting legal formality.[103]

In a slightly different context, Craven has argued that '[d]ecolonization […] was not something that could be managed without simultaneously putting in question the very basis upon which law itself had been constructed'.[104] The challenge Craven identifies was not only directed towards the 'orthodoxy' of international law. It was also a question and a challenge for NIEO, which unsurprisingly—if we accept Koskenniemi's arguments—its proponents failed to address. Indeed, the pressure for NIEO was even greater, to the extent that its arguments were not just about the international law of its time. Rather, NIEO drew from international law whilst attempting to reform it, a project that inevitably trapped it in international law's oscillation between concreteness and normativity.

4:3:2 Beyond (in)coherence: the politics of NIEO

Tracking the oscillation of NIEO between ascending and descending argumentation is crucial, to the extent that NIEO's advocates themselves firmly placed their project within international law and never attempted a total rejection, or even a fundamental reconceptualization, of the discipline.[105] A legal project must be judged against legal standards. Nonetheless, it needs to be stressed that the contradictory arguments of the project do not suffice to explain its failure. If we accept Koskenniemi's line of thought, this contradictory argumentation is endemic to international legal argument:

> Consequently, international legal discourse cannot fully accept either of the justificatory patterns. It works so as to make them seem compatible. The result, however, is an incoherent argument which constantly shifts between the opposing positions while remaining open to challenge from the opposite argument. This provides the dynamics for international legal argument.[106]

If this is the case, then the reasons why certain international legal arguments or international legal projects fail or succeed need to be sought outside their internal (in)coherence. To bring a directly relevant example, the international law of colonialism faced significant challenges in explaining why treaties signed with the otherwise legally incompetent native populations of the colonies were legally valid. Nevertheless, these treaties were operative, colonialism was thriving, and the international law of the time contributed significantly to the maintenance of the *status quo*. Hence, arguing that international law's mission of 'civilisation' succeeded because it was legally superior to the

[102] Ibid., 60, 485.

[103] Ibid., 484-88.

[104] Craven (*supra* note 90), 6.

[105] 'Their attitudes towards these rules is being revealed. These range from acceptance to rejection, but mainly center around a call for specific revisions in the different rules.' Abi-Saab (*supra* note 45), 100.

[106] Koskenniemi (*supra* note 3), 60.

international law of 'development', is an untenable position. Without disputing that there might be legal arguments that are better than others, it is contended here that the ultimate success of international legal arguments lies outside the realm of law. This is particularly the case with regard to arguments about the basic construction of a legal system, in our case international law.

In this section, the reasons that contributed to NIEO's failure are divided into two broad categories: first, the factors related to the overall political climate of the time, with a focus on the modalities of the Cold War and the rise of neoliberalism, which coincided with the official 'launch' of NIEO. Secondly, NIEO adopted a very specific reading of colonialism and the international law of the colonial era that narrowed its political horizon. This reading emphasised international law's complicity with the exploitation of the colonies, ignoring the social engineering employed through international legal techniques for the social transformation of the colonies into capitalist states.

4:3:2:1 The political context: from the divisions of the Cold War to globalised neoliberalism

To begin with, it is significant to keep in mind that, as both a political and as a legal project, NIEO was not only facilitated but also constrained by the necessities of the Cold War. To a certain extent, the divisions of the Cold War enabled the demands of post-colonial states. First, the communist bloc was sympathetic towards the demands of the Third World, since they saw the end of colonialism as an ideal opportunity for the spread of socialism. This was reflected in the voting patterns of the UNGA, where the Soviet bloc always sided with the demands of the Third World. Moreover, and especially after the Suez Crisis,[107] the Third World operated under the reassurance that at the end of the day the USSR would side with them politically and even militarily, if absolutely necessary.[108] Regardless of the accuracy of this conviction, it was still a factor that boosted the confidence of Third World leaders and allowed them to adopt a more proactive stance *vis-à-vis* the West. Simultaneously, the West, and more specifically, the US, were alarmed by the appeal the Soviet model had over the newly

[107] In 1956, Egypt's President Nasser nationalised the Suez Canal, provoking anxiety in the West, even though compensation was provided and passage through the canal was not disrupted. While the crisis was heading towards its resolution, the armed forces of Israel, France and Britain invaded Egypt, while Egypt sank a number of ships in the Canal. The USA and the USSR forced Britain and France to withdraw, causing their humiliation and signalling the death-knell for Britain's empire. For the history of the canal and international law, see: M. Arcari, 'Suez Canal' in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2007).

[108] 'The Suez affair is a case in point. The latter case shows that the present international atmosphere has created a situation in which there is a balance of conflicting interests favorable to the development of international law.' Anand (*supra* note 89), 390. 'The Cold War and the loose bi-polar structure of power have helped not only in the emancipation of these newly independent states, but also in enhancing their power on the world scene.' Abi-Saab (supra note 45), 98.

decolonised world.[109] To a certain extent, this meant that they were prepared to be responsive to the developmental concerns of the Third World, in order to prevent them from 'falling' to the embrace of communism. These concerns explain in part why the politically conservative Henry Kissinger was ready to adopt a conciliatory stance towards the Third World, even if it can be argued that it was more rhetorical than anything else.[110]

That being said, the influence of the Cold War over NIEO was more complicated. Although prominent NIEO figures typically adopted a vaguely Marxist rhetoric,[111] and despite the fact that dependency theories of the time were influenced from Marxism, the Third World was careful not to be too closely affiliated with the USSR. This was necessary for it to maintain its autonomous voice; or, as Tourme-Jouannet has observed, 'the new nations now known as the Third World sought to organise themselves so as to be autonomous and united with respect to the two blocs and to express their own view of the world and international law'.[112] In practice, this choice bore practical and theoretical difficulties. For example, there was a clear concern amongst certain Third World international lawyers that the demands of post-colonial states had to be moderate and not challenge too aggressively Western power.[113] The concern not to be too radical was a restraint to what NIEO could or could not propose. Furthermore, the divisions of the Cold War also challenged the unity of the Third World. For instance, even though they chose to co-exist under the umbrella of the G77, Yugoslavia represented a model of socialism that was antagonistic but not hostile to the USSR, whereas Suharto's Indonesia was a fiercely anti-Communist regime, which therefore enjoyed the

[109] Mazower (*supra* note 20), 290.

[110] 'On April 15, 1974, Kissinger delivered a speech to the Sixth Special Session titled "The Challenge of Interdependence" in which he acknowledged the "common destiny" of developing and developed countries. Kissinger's speech adopted a conciliatory stance but did not substantively go beyond making several deliberately broad declarations of goodwill to which the United States could not be held later.' 'In an about-face, Kissinger declared that the United States was amenable to commodity agreements if negotiated on a case-by-case basis. But besides such conciliatory proposals, Kissinger insisted on the important role that private capital and capital markets would play in the process of development. The United States, moreover, suggested establishing an International Investment Trust to increase portfolio capital for investment in local enterprises.' V. Ogle, 'State Rights against Private Capital: The "New International Economic Order" and the Struggle over Aid, Trade and Foreign Investment, 1962-1981' (2014) 5 Humanity 211, 219, 221.

[111] To bring but a few examples, the hero of independence and first president and prime minister of Ghana, Kwame Nkrumah, was an avid admirer of Lenin and one of his major publications (*Neo-Colonialism: The Last Stage of Imperialism*) clearly echoes Lenin's classic work, *Imperialism: The Last Stage of Capitalism*.

[112] Tourme-Jouannet (*supra* note 61), 21.

[113] 'There is no doubt that the wave of nationalism in the new and underdeveloped states has led them sometimes to take excessive and perhaps unreasonable positions against the colonial powers.' Anand (*supra* note 89), 390.

support of the West. This meant that everything had to be negotiated carefully within the G77, so as to ensure that very diverse regimes were in agreement. Consequently, this process 'smoothed' the potentially more radical edges of NIEO.

The situation was further complicated by the rise of neoliberalism during the 1970s.[114] NIEO was articulated in terms of 'states' rights'[115] and envisaged a central role for the state in the developmental and modernisation process, including varying degrees of state planning. This understanding was not strange to the West that, under Keynesianism, was also engaging with state planning. At the end of the day, it can be said that NIEO was an attempt to expand Keynesianism to the newly independent states and to their relationship with the rest of the world.[116] It was resisted partly on grounds of Western exceptionalism, but still indicates the existence of a common language between NIEO and the Keynesian economic orthodoxy of the time. This changed radically with the rise of the neoliberal school of thought. The significance of the rising tide of neoliberalism is evident in the stance of the US *vis-à-vis* NIEO. As Sargent has argued, the position of the US was more contradictory than outright hostile: traditional conservatives like Kissinger were ready to compromise on certain economic points, in order to maintain American political hegemony.[117] However, Kissinger found himself increasingly isolated within the US administration as neoliberals advocated for an uncompromising stance.[118] Crucially, for neoliberals, the objective was not protecting the *status quo* from the attacks of the Third World, as Kissinger attempted to do. Much more radically, they envisaged an entirely new international legal, economic and political order based on generalised free competition and on minimised welfarism, which is will be analysed in detail in the next chapter of this thesis.

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[114] For further analysis of the concept, see Section 5:1 A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism of the thesis at hand.

[115] This follows from Moyn's observation that decolonisation was argued in terms of peoples' and not human (individual) rights: S. Moyn, *Last Utopia: Human Rights in History* (Harvard University Press, 2012), 84-120. For the relation between states' rights and neoliberalism, see: S. Singh, 'The Fundamental Rights of States in Neoliberal Times' (2016) Cambridge Journal of International Law (forthcoming).

[116] 'Apart from a few very radical provisions, the NIEO appeared to be less of a wholesome break with the older order, than a redirection of the old pluralistic liberal view in favour of a new equilibrium in economic relations between North and South.' Tourme-Jouannet (*supra* note 61), 25.

[117] 'Instead, by appeasing the Global South in specific areas, such as commodity prices and food assistance, Kissinger sought to stabilize the existing international order. If quieting the Third World's insurgency required concessions, Kissinger was willing to make them. He would not mount the barricades in defense of what he called the ''theology about the merits of the free market economy.''' D. J. Sargent, 'North/South: The United States Responds to the New International Economic Order' (2015) 6 Humanity 201, 207.

[118] Ibid., 208.

Hence, when Margot Salomon writes that NIEO failed because of the staunch opposition of developed states,[119] it is essential to contextualise and qualify this statement. This is because the West was also inimical or reserved with regard to decolonisation in the first place, though the process succeeded against their will. Hence, the stance of the West as such does not determine fully the success or failure of such initiatives. Furthermore, the 1970s and 1980s marked a period of intense social and ideological contestation within the West. From students' mobilisations across Western Europe and the USA, to Italy's 'Hot Autumn' and intense strikes in 1969-1970, and from British 'stagflation' and the 'Winter of Discontent' to the rise of African-American socialist radicalism in the USA, it was becoming evident that the post-war economic model was coming to an end and opposing social forces were clashing over what would replace it.[120] This process of intensified social struggles was concluded with the triumph of neoliberalism, which was fundamentally hostile to NIEO's demands.[121]

4:3:2:2 NIEO, domestic structures of power and capitalism: the limitations of a project

In this subsection, I will reflect on the question of the internal deficiencies and incoherencies of NIEO that contributed to its defeat. More specifically, I will argue that NIEO incorporated many of the core concepts of liberal international law. Further, I will suggest that, by incorporating the hegemonic narrative that perceives the world as divided into states, NIEO adhered to a liberal ideology that 'reads' colonialism and the international law of the time in a way that excluded from its conceptual horizon capitalist transformation and class divisions.

A point of criticism common between sympathisers and critics of NIEO is its remarkable silence when it comes to issues of domestic income distribution, oppression and inequality.[122] It is telling that

[119] Salomon (*supra* note 2), 46.

[120] 'The crisis of capital accumulation in the 1970s affected everyone through the combination of rising unemployment and accelerating inflation. Discontent was widespread and the conjoining of labour and urban social movements throughout much of the advanced capitalist world appeared to point towards the emergence of a socialist alternative to the social compromise between capital and labour that had grounded capital accumulation so successfully in the post-war period.' D. Harvey, *A Brief History of Neoliberalism* (OUP, 2005), 14-15.

[121] For an overview of neoliberalism and its implications for international law see Section 5:1 'A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism'.

[122] 'What state-based rights talk did not address, or at least only made implicit was the internal, domestic distribution of resource profits. It was implied that national control over resources would allow for growth according to domestic needs and thus for bringing prosperity and well-being to a greater share of the population. But at least in the medium and long run, new and old elites in many Third World countries scrupulously enriched themselves by commodities without ever attending to the needs of the poor.' Ogle (*supra* note 110), 217. See also: 'It is a grand design for the redistribution of global wealth- not, however, from wealthy to poor individuals, but rather from wealth to poor *states*.' Neff (*supra* note 85), 190 (emphasis as in the original).

Chapter 1 (m) of the Charter of Economic Rights and Duties set as a goal of NIEO the 'promotion of international justice', and the same chapter (i) relies on the presumption that colonialism did injustice to entire nations,[123] which are represented in the international legal realm by states, and not to specific sections of the population that were submitted to colonial and later capitalist rule. Therefore, in the context of NIEO, colonial societies were perceived and represented as a homogeneous whole and no internal distinctions, based on class, gender or ethnicity were considered of importance. The mirror image of this is the representation of Western capitalist economies as homogeneous, as places where prosperity is enjoyed equally and, importantly, where poverty and exploitation are absent, whereas widespread prosperity is due to industrialisation and not due to popular struggles for fairer wealth distribution.[124] Anghie has observed development was a means to safeguard national unity for post-colonial states: '[t]he development state thus represented universal interests that would prevail against interests of minorities that were absorbed and assessed by criteria which were often externally determined and which purported, with formidable force, to be universal'.[125] This observation applies *a fortiori* to NIEO, since the state was elevated to the primary locus of development in an attempt to smooth ethnic conflicts. The argument advanced here is that NIEO, by focusing on a world divided between unequal *states*, forged national unity not only between ethnic groups, but even more significantly between classes. By referring to 'proletarian nations',[126] Bedjaoui was in essence constructing a binary scheme that neutralised social divisions within each and every state. It is worth recalling here that the phrase 'proletarian nations' has had a troubled political history. Despite its linguistic affiliations to Marx and Marxism, the phrase was in fact coined by the Italian nationalist intellectual, Enrico Corradini, and used extensively by Mussolini's regime.[127] This is not to imply any

[123] 'Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;' Chapter 1 (i) of the Charter of Economic Rights (*supra* note 47).

[124] The best illustration of the destructive effects of industrialisation upon the lives of the English working class is provided by: F. Engels, *The Condition of the Working Class in England* (Penguin, 2009). Published in 1844 in the apogee of the industrial revolution this descriptive piece of works hints that industrialisation did not result in any direct amelioration of the lives of the working class and the poor in general. Further, studies on the material conditions of life in late Medieval societies indicate that the living conditions of the average working person where significantly better in the later Medieval era rather than in the first centuries of capitalism. For example, Braudel has argued that meat consumption in late Medieval Europe reached such levels that it was only restored after 1945: F. Braudel, *Civilization and Capitalism, 15-18th Centuries: The Structures of Everyday Life* (William Collins & Sons, 1981), 190-199.

[125] Anghie (*supra* note 61), 206.

[126] See note 81.

[127] '[Corradini] applied to nations the socialist notion of solidarity among subordinated classes and claimed that, in the same way as subordinated classes are proletarian classes, so subordinated nations are proletarian nations. Thus, international socialism is transformed into national socialism and Italy, as well as other subordinated

ideological proximity between NIEO and fascism; if anything, NIEO mobilised the concept for anti-imperialist purposes, while the intellectual 'fathers' of the concept of 'proletarian nations' were staunch imperialists.[128] However, the adoption of the phrase, coupled with NIEO's exclusive focus on international patterns of oppression and dispossession, indicate how the initiative was oblivious to class divisions and domestic oppression in a way that left domestic elites outside its framework.

The structure and function of international law necessitated and facilitated this political choice. The elementary positivist position, that the world consists of states and international law, reflects this reality; by elevating states to its primary subjects, it provides a conceptual framework that facilitates the construction of 'national unity' narratives that conceal the fundamental reality that societies consist of exploiters and exploited.[129] Apart from this fundamental issue of international legal *form*, international law has also exiled class from its substantive vocabulary. The International Labour Organization acknowledges the existence of social classes, only to call for their co-operation, and practically denounces class struggle.[130] Moreover, class appears as a prohibited basis of discrimination, but is not acknowledged generally as a basis of exclusion, oppression and vulnerability, for example regarding the protection of rights.[131]

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nations became proletarian nations.' F. De Donno, 'Orientalism and Classicism: The British-Roman Empire of Lord Bryce and his Italian Critics' in P. F. Bang and C. A. Bayly (eds), *Tributary Empires in Global History* (Palgrave, 2011), 63.

[128] For Corradini, '[t]he international struggle, conquest and imperialism - as opposed to emigration and pacifism - are the path to Italian national affiliation.' Ibid., 64.

[129] For the stunning absence of the Marxian concept of exploitation from international law, see: S. Marks, 'Exploitation as a Legal Concept' in S. Marks (ed.), *International Law on the Left* (CUP, 2008), 281-307. For the necessity to think about international law restoring the primacy of the concept of class, see: A. Rasulov, '"The Nameless Rapture of the Struggle": Towards a Marxist Class-Theoretic Approach to International Law' (2013) 19 Finnish Yearbook of International Law 243.

[130] 'The International Labour Organization (ILO) is the only tripartite UN agency with government, employer, and worker representatives. This tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its Member States can freely and openly debate and elaborate labour standards and policies.' In 'ILO Tripartite Constituents', available at: http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.html [last accessed 23 June 2016].

[131] In international legal documents, any class-based analysis is substituted by vague references to 'the poor': 'The impact has been particularly severe on the most vulnerable: the poor, older persons, pensioners, persons with disabilities, women, children and immigrants.' 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina' Human Rights Council Twenty-Fifth Session A/HRC/25/50/Add.1

Furthermore, as was argued in previous chapters of this thesis,[132] international law was instrumental in the colonial process of social engineering that altered profoundly colonial societies. Through international legal techniques like extraterritoriality,[133] nineteenth-century international law promoted state centralisation and the construction of a bureaucracy that would mediate class divisions, promoting the interests of aggregate social capital. Paradoxically, NIEO was, amongst other things, the outcome of this process. This noticeable silence regarding domestic wealth distribution was partly attributable to NIEO being, to an extent, a strategy of the national ruling classes of the Third World. Even though it is inaccurate to conceptualise the ensemble of the reforms promoted by NIEO as such, at least some of these were essential for enhancing the relative power of the Third World bourgeoisie in comparison to their Western competitors. Regulation of transnational corporations is a good example to verify this claim. In his contribution to the debate, Bulajić expressed the standard position of post-colonial states by arguing that enterprises from 'developing countries' should not be subjected to the same regulations as businesses from 'developed states'.[134] One could argue that this might be a tenable position regarding Yugoslavia of the time, to the extent that enterprises were under workers' control, a feature that partly (but not wholly) differentiated them from other businesses. However, it is unclear why privately-held businesses incorporated in a Third World state deserved beneficial treatment, to the extent that they served the interests of those that hold the means of production to the detriment of those subject to exploitation. Therefore, it is unclear why these businesses should not be regulated tightly. Hence, such proposals aimed to ameliorate the position of Third World capitalists in global competition and they were agnostic, or even hostile, to the interests of working classes or poor peasantry in the same states. The same could be argued about NIEO's demands for trade liberalisation regarding products manufactured in the Third World.[135]

My argument does not imply that NIEO was in its entirety a bourgeois project. NIEO contained radical demands that would have reshaped the international legal and economic landscape, had they succeeded. Moreover, even in the context of Marxism, it is recognised that other contradictions,

[132] See note 2 above.

[133] See Chapter 2 of this thesis.

[134] Bulajić (*supra* note 53), 57.

[135] In a slightly different, but directly relevant context, Ha-Joon Chang has argued against trade liberalisation in agricultural products: 'Moreover, some (although obviously not all) of the prospective "losers" from agricultural trade liberalization within rich countries will be the least well-off people by their national standards (e.g., hard-pressed farmers in Norway, Japan or Switzerland), while some of the beneficiaries in developing countries are already rich even by international standards (e.g., agricultural capitalists in Brazil or Argentina). In this sense, the popular image that agricultural liberalization in rich countries is helping poor peasant farmers in developing countries is misleading.' H.J. Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press, 2008), 79-80.

beyond the class struggle, are politically significant.[136] In this case, there are strong political, economic and moral arguments for bridging the wealth gap between poor and rich states. That said, it bears recalling that, from a Marxian point of view, this political quest is always determined in the final analysis by class interests and antagonisms.[137] Hence, if bridging this gap means that local bourgeoisies improve their relative strength in the context of global capitalism, radical or even progressive international lawyers should be reserved in their support for such a strategy. The argument put forward here is that NIEO combined both strategies, and its choice to 'speak' the language of international law was both symptomatic and constitutive of its political limits, as it endorsed the language of 'state rights', creating a legal and political narrative that equated the interests of divergent and antagonistic classes to the interests of the state. Hence, the assertion by MacVeigh and Pahuja that Permanent Sovereignty over Natural Resources 'could therefore be understood as motivated by the desire to reject both colonial and capitalist forms of rule'[138] should be treated cautiously, bearing in mind the inherent limitations of the 'states' rights' legal language and the contradictions of NIEO as a political project that brought together Tito's socialist Yugoslavia and Suharto's anti-communist Indonesia.

In the final analysis, Abi-Saab argued that 'every legal system protects a certain structure of power. A defence of a legal system is a defence of the political system it consecrates.'[139] NIEO did not exactly defend international law in its entirety, but did not attack its foundations either. If we accept the argument put forward in this thesis that the primary function of international law was and still is the promotion and stabilisation of capitalist relations of production on a global level, this deference to international law can also be understood as an ambivalent stance (or even endorsement) of its principal political project: capitalism. Despite its contradictions and its polymorphous nature, NIEO left unchallenged the core of the 'civilising mission' of international law as deployed in the course of the nineteenth century and until the collapse of formal imperialism in the 1960s. Undeniably, this process ordered political communities in accordance with their degree of 'civilisation', placing the West firmly at the top. NIEO was a revolt against this process. Simultaneously, international law contributed to the transformation of non-Western polities into centralised states capable of supporting capitalist relations of production. Indeed, it is a core argument of this thesis that this process was at

[136] '[R]elations of power do not exhaust class relations and may go a certain way beyond them. Of course, they will still have class pertinence, continuing to be located, and to have a stake, in the terrain of political domination… [C]lass division is not the exclusive terrain of the constitution of power, [however] in class societies all power bears a class significance.' N. Poulantzas, *State, Power, Socialism* (Verso, 2000), 43.

[137] See: 'The capitalist mode of production: a very brief introduction' in the Introduction of the present thesis.

[138] S. MacVeigh and S. Pahuja, 'Rival Jurisdictions: The Promise and Loss of Sovereignty' in: C. Barbour and G. Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge, 2010), 102.

[139] Abi-Saab (*supra* note 45), 101.

the heart of the 'standard of civilisation'.[140] NIEO not only failed to challenge this process, but actively reinforced it.

Conclusion

Eric Hobsbawm once wrote that 'the Age of Empire created both the conditions which formed the anti-imperialist leaders and the conditions which […] began to give their voices resonance'.[141] Few instances verify this claim as much as the quest for a New International Economic Order. In this chapter, it was argued that NIEO incorporated three major conceptual bases of contemporary international law: the state as the only legally acceptable form of communal organisation; development and industrialisation as the only road to prosperity; and the state as the indivisible unit of economic interests to the expense of conflicting class interests.

NIEO should be understood as a by-product of the successful social transformation in the course of the colonial project. In this process, the role of international law can hardly be overstated. By promoting state centralisation and the dissolution of archaic modes of production through international legal techniques, such as the Mandate System or extraterritoriality, the colonial encounter created the conditions that determined its termination. Since state centralisation was already initiated, anti-colonial struggles that prioritised the creation of independent states resonated more with the material conditions on the ground and, therefore, triumphed over alternative solutions (Pan-Arabism, Pan-Africanism etc). Moreover, the universal reach of international law provided the oppressed peoples with a language to express their political demands, while simultaneously channelling and restraining them. Correspondingly, the discourse of development provided post-colonial states with a language to express their disappointment with the fact that political independence did not bring about economic independence and prosperity. Crucially, this political project embraced international law, seeking to reform it to the benefit of the Third World, while accepting its core concepts and underlying assumptions. In turn, this endorsement trapped post-colonial states in the antinomies of international legal argumentation, rendering their claims contradictory and inconsistent. Combined with the complicated political balance of the time and the emergence of neoliberalism, this signalled the failure of NIEO.

Anghie has observed that, in the context of NIEO, development was the solution, though it was not clear what the problem was.[142] To a significant extent, NIEO stemmed from the conviction that the root cause of everything that was wrong was anaemic capitalist accumulation in the Third World. Therefore, NIEO incorporated mainstream economic positions that maximum growth was quasi-

[140] See: 'A way forward: capitalism as civilisation' in Chapter 1 of this thesis.

[141] E. Hobsbawm, *The Age of Empire: 1875-1914* (Weidenfeld and Nicolson, 1987), 78.

[142] Anghie (*supra* note 61), 208.

automatically beneficial for everyone in a given society and, to a certain extent, constituted a strategy for the ruling classes of the Third World to enhance their own position in global competition. Even though it is counter-productive to attempt to understand that which preceded the other conceptually, it suffices to note that the prioritisation of international law in the context of NIEO is intrinsically linked with the apparently 'classless' nature of its demands. In practice, this meant that its demands were either linked with a liberal perception of economics that equated the growth of the economy with widespread prosperity, or served the interests of the ruling classes.

All of the above remarks hint at the complicated nature of NIEO, both on a legal and political level. Despite the objections raised, NIEO must be understood as having an ongoing legacy for international law. This is not because of its actual influence on international law, which was piecemeal and temporary. What is crucial about NIEO is how the attempt to reform international law and economy revealed how the latter is not a natural condition of the world, but is heavily determined by the former. Indeed, the international legal order was to undergo a major transformation at the time. However, the substance of this transformation was at the opposite end of what NIEO envisaged. Neoliberalism was a rising force, and it was about to challenge the post-war *status quo* as well.

Chapter 5: International territorial administration: international law and capitalism in a post-colonial world

If we want things to stay as they are, things will have to change.

Giuseppe Tomasi di Lampedusa, 'The Leopard'

History is full of ironies; international legal history no less so. At the time, the oil crisis of 1973 was seen as the event that enhanced the confidence of the Third World and led to the promulgation of the NIEO programme.[1] Nowadays, NIEO is largely forgotten, and 1973 is remembered as the tipping point for the demise of Western social-democracy and the of neoliberalism as the hegemonic ideology and dominant organising principle of governance across the world.[2] Indeed, relatively recently, it was documented how opposition to NIEO led neoliberals to devise a coherent programme for development that was distinct, both from 1960s modernisation theory and from the global welfarist aspirations of the Third World.[3]

This chapter maps the ways in which this transition to global neoliberalism transformed international law in the post-1990s period. More specifically, I will argue that international law and international institutions persisted as a force, consistently promoting and consolidating the capitalist mode of production. However, after the 1990s, international law and international institutions promoted a very specific variant of the CMP, neoliberalism. My argument develops in three steps. First, a brief history of the rise of neoliberalism will be provided, with an emphasis on the relevant international legal developments, such as the decisive upgrade of the role of the Bretton Woods institutions. My main contention will be that, far from signalling a return to nineteenth-century liberalism, neoliberalism constitutes a novel form of capitalist accumulation, endeavouring to establish generalised competition as the fundamental basis of social co-existence, while acknowledging the importance of the state and

[1] 'In 1973, the OPEC oil cartel's price hike was cheered on by many developing countries since it was, as one put it, the first time that non-Western powers had taken the initiative in the world economy. A meeting of the nonaligned movement in Algiers that year revived Raúl Prebisch's old call for a New International Economic Order to improve the position of the Third World.' M. Mazower, *Governing the World: The History of an Idea* (Penguin Books, 2012), 303.

[2] 1973 is commonly singled out as a symbolic date, not only because of the oil crisis that threw Western capitalist states into a hegemonic crisis, thereby warranting a re-organisation of the power bloc, but also because the first neoliberal government was established in Pinochet's Chile: 'The first experiment with neoliberal state formation, it is worth recalling, occurred in Chile after Pinochet's coup on the 'little September 11th' of 1973 (almost thirty years to the day before Bremer's announcement of the regime to be installed in Iraq).' D. Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005), 7.

[3] J. Bair, 'Taking Aim at the New International Economic Order' in P. Mirowski and D. Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press, 2009).

other institutions in the construction of this competitive order. This section of the thesis offers a short intellectual history of neoliberalism and contains few direct references to international law and institutions. However, this analysis is essential to the extent that it provides us with the theoretical framework needed for comprehending international territorial administration, and, later, the occupation of Iraq. Secondly, an account of the position of international law and international organisations in neoliberal thought will be provided. Even though an exhaustive account of neoliberal internationalist thought falls outside the scope of this chapter, I will attempt a comparison between the positions of the ordo-liberal Roepke and that of Hayek. The principal argument put forward is that the internationalisation and legalisation of economic decision-making was seen as a crucial step for building a global neoliberal order, rolling back on the welfare state and restraining the impact of mass democratic politics on economic policy. Finally, this chapter will focus on the practice of international territorial administration (ITA), which gained substantial support in the course of the 1990s as the primary method of governing post-conflict societies and managing their transition to neoliberal capitalism. Drawing from the legacy of the Mandate System,[4] international organisations, such as the UN, the EU, the IMF and the World Bank, were elevated into the main loci of managing and co-ordinating neoliberal social engineering. In turn, this analysis will pave the way for the final case study of the present thesis: the neoliberal reconstruction of Iraq in the aftermath of the 2003 invasion, and the role of international law and institutions in facilitating and legitimising the reconstruction process.

5:1 A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism

The previous chapter of this thesis focused on the process of decolonisation and on the rise and fall of the New International Economic Order (NIEO) in the course of the first four post-war decades.[5] However, this section will go back to the final quarter of the nineteenth century. The history of neoliberalism can be better understood if situated within the overall history of liberalism and, more specifically, if examined in relation to liberalism's prolonged internal and external crisis that was triggered during the last decades of the century and peaked with the 1929 crash and the Great Depression. The rapid rise of the capitalist mode of production (CMP) dissolved traditional modes of living, and deprived entire communities from their traditional means of sustenance, forcing them to turn to industrial labour and to move to cities. Sinclair summarises the situation and its profound influence on political thought as follows:

[4] See Section 3:2:2 'The Permanent Mandate Commission: supervising the experiment' of the present thesis.

[5] See Chapter 4 of the thesis at hand: 'From decolonisation to the New International Economic Order: continuities and ruptures in international law'.

> A range of problematic conditions accompanied the expansion of European commercial activity. Population growth, spreading industrialization and urbanization in Europe were attended by mounting anxieties regarding the 'social question'. Pictured as a realm of disorder located 'between' the economy and the state, 'the social' was associated with multiple interlinked problems connected to a large, underemployed proletariat.[6]

In that context, Bismarck's Germany was the first state to introduce welfarist provisions intended to protect workers from the destitution associated with unemployment and to deter the advancement of revolutionary ideologies.[7] More states, including the Nordic states, the Netherlands, and – notably – the United Kingdom,[8] were to follow this example, introducing laws aiming at a partial de-commodification of labour-power. Hence, the idea that workers had 'to be free from pressure to commodify their labor in order to obtain their basic survival'[9] started to gain ground, both domestically as well as internationally. In 1903, the International Labour Office was established and represented 'a model of social reform that promoted social legislation as an alternative to violent revolution'.[10] The Office not only paved the way for the establishment of the International Labour Organization (ILO), but it also produced the 1906 conventions prohibiting night-time work for women and the usage of white phosphorous in the production of matches.[11] The establishment of the ILO crystallised the trend towards a partial internationalisation of a welfarist approach to labour, especially under the pressure of the newly-founded USSR. Even colonialism was infiltrated by the emerging welfarist spirit, which was central in the function of the Mandate System of the League of Nations.[12]

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[6] G. F. Sinclair, 'State Formation, Liberal Reform and the Growth of International Organizations' (2015) 26 European Journal of International Law 445, 462.

[7] 'It has become a convention to date the welfare state's birth as 1883, when Bismarck introduced the first modern social insurance. Bismarck's social policy rationale was strongly anti-socialist in that it was consciously designed to temper the workers' revolutionary potential and to supplement the earlier repressive but ultimately unsuccessful antisocialist laws.' K. van Kersbergen and B. Vis, *Comparative Welfare State Politics: Development, Opportunities and Reform* (Cambridge University Press, 2013), 38.

[8] For a normative defence and a historical account of the welfare state in the UK, see: K. Polanyi, The *Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001).

[9] P. Tsoukala, 'Euro Zone Crisis Management and the New Social Europe' (2013) 20 Columbia Journal of International Law 31, 48.

[10] Sinclair (*supra* note 6), 464.

[11] Ibid., 465.

[12] For an analysis of the welfarist aspect of the Mandate System, see: Section 3:3 'Capitalist transformation and international law: labour, trade and welfare in the Mandates' of the present thesis. For other welfarist aspects of the League, see: E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP, 2012), 169-83.

Keynesianism was the most coherent version of this emerging welfarist agenda.[13] Consistently applied in the US after the reversal of the *Lochner* precedent in the US Supreme Court,[14] Keynesianism, or 'embedded liberalism', influenced profoundly the fabric of international law and was crystallised in certain important post-war legal instruments, such as the General Agreement on Tariffs and Trade.[15] Crucially, Keynesianism was an internal, rather than external, let alone hostile, response to the crisis of traditional liberalism. Dardot and Laval succinctly summarise this point: 'it should not be forgotten that Keynesianism and neo-liberalism for a time shared the same concern: how to save from liberalism itself what could be salvaged of the capitalist system.'[16] Nevertheless, this convergence was to come to an end soon, with the emergence of the two major neoliberal currents that specifically took aim at the Keynesian orthodoxy of their time: German ordo-liberalism and American neoliberalism.[17] Along with Keynesianism, neoliberals of all strands acknowledged the limitations of *laissez-faire* liberalism. In the Walter Lippmann colloquium, which is largely considered the founding moment of neoliberalism,[18] Rougier called for the construction of a 'positive liberalism'.[19] This 'positive' or 'neo' liberalism would depart from its classical antecedent, acknowledging that the market is not a natural, pre-political order that flourishes, if left alone by the state. Rather, as Roepke, one of the most prominent ordo-liberals, put it, '[t]he free market requires an active, an extremely vigilant policy'.[20]

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[13] See generally: John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (MacMillan, 1957).

[14] 'The "Lochner era", of course, refers to the Supreme Court's desultory affair with economic libertarianism, beginning in the late nineteenth century and abruptly ending on or about March 29, 1937, with *West Coast Hotel Co. v. Parrish*.' J. Purdy, 'Neoliberal Constitutionalism: Lochnerism for a New Economy' (2015) 77 Law and Contemporary Problems 195, 196.

[15] 'The post-war trade regime therefore came to be deeply allied to—indeed in many ways an outward projection of—the Keynesian welfare state in all its varied institutional forms. One of the regime's primary purposes was to maintain the international stability necessary to protect the welfare state from external shocks.' A. Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (OUP, 2011), 30.

[16] P. Dardot and C. Laval, *The New Way of the World: on Neo-Liberal Society* (Verso, 2013), 38.

[17] The distinction is largely attributable to Michel Foucault, who in his relatively recently published lecture series, *The Birth of Biopolitics*, provides us with one of the most comprehensive accounts of neoliberalism as an intellectual current. See: M. Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979* (Palgrave-Macmillan, 2010). Despite the significant differences between the two strands, this thesis refers to 'neoliberalism' as a generic term that captures the similarities between them.

[18] The conference took place in Paris in 1938, bringing together theorists who were to become the most prominent neoliberals, such as Hayek, Rueff, Röpke and Rustow. For further details, see: F. Denord, 'Aux Origines du neo-liberalisme en France: Louis Rougier et le Colloque Walter Lippmann de 1938' (2001/2002) 195 Le Mouvement Social 9.

[19] Quoted in: Foucault (*supra* note 17), 133.

[20] Ibid.

Otherwise put, neoliberals departed from the convictions of classical liberalism,[21] and acknowledged that the relationship between the state and the market was not a zero-sum game.

However, unlike Keynesians, neoliberals advocated for state intervention, in order to sustain, support and expand the functions of the market, and not in order to limit them. In Foucault's words, if the purpose of Keynesianism was to balance out the anti-social effects of competition through state intervention, the purpose of neoliberal state intervention is to 'nullify the possible anti-competitive mechanisms of society, or at any rate the anti-competitive mechanisms that could arise within society'.[22] Therefore, the elementary differentiation between the 'new' liberals of the New Deal and of the ILO, and the 'neoliberals', was not about the desirability or even about the degree of state intervention in the economy; rather, it was about the purpose and orientation of such interventionism. It was in this context that neoliberals also started thinking seriously about law and legality, be it domestic or international. In 1937, Robbins proclaimed that: '[n]either property nor contract are in any sense natural. They are essentially the creation of law ... the actual result of centuries of legislation and judicial decision.'[23]

Further, neoliberals attempted a second correction to classical liberalism. Within the neoliberal framework of thought, it is competition, instead of free exchange, that is elevated to the organising principle of economy and, more broadly, of society. Friedman summarises the shift as follows: '[b]ut instead of the nineteenth century understanding that *laissez-faire* is the means to achieve this goal, neoliberalism proposes that competition will lead the way'.[24] This modification has important implications for the relationship between the market and interventionist policies. If one moves away from the simplistic imaginary of free exchange, one needs also to move away from the simplistic understanding of the state as a minimal entity that solely guarantees public order and property rights necessary for acts of free exchange to occur. Rather, generalised competition is a fragile condition that requires constant state intervention in order to uphold and solidify its bases. Despite its popularised version and the common perception amongst its opponents, neoliberalism is not an inherently anti-

[21] 'This corresponded to the erroneous belief in the autonomy of the economic sphere as dominated by economic law independent of institutions, legal forms or social habits. […] This belief was triumphant in the period of the historical liberalism of the Nineteenth Century whose representative came dangerously near to the idea that the competitive economic order might be a completely natural order.' W. Roepke, 'Economic Order and International Law' (1954) 86 Recueil des Cours 203, 210.

[22] Foucault (*supra* note 17), 160.

[23] L. Robbins, *Economic Planning and International Order* (MacMillan, 1937), 227-28.

[24] Quoted in P. Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso, 2013), 38.

statist ideology. Unlike their occasional fellow-travellers, libertarians,[25] neoliberals emphasise the significance of the state in establishing and maintaining functional markets. James Buchanan was clear in stressing the difference between neoliberals and the so-called 'anarcho-capitalists': 'Among our members, there are some who are able to imagine a viable society without a state… For most of our members, however, social order without a state is not readily imagined, at least not in any normatively preferred sense.'[26] What neoliberalism aspires to achieve is to redesign the legitimate agenda and the legitimate mode of governing. In *The Road to Serfdom*, the neoliberal *locus classicus*, Hayek was clear in that the question of whether the state should intervene or not in the economy was 'ambiguous and misleading'.[27] His suggestion to resolve this problematic dilemma was that 'it is the character rather than the volume of government activity that is important'.[28]

To return to international law and international institutions, the theory and practice of organisations like the World Bank or the IMF indicate that it is problematic to equate neoliberalism with deregulation or with a total offence against the state. Since the late 1990s, the World Bank and the IMF increasingly focused on institutional reforms and state restructuring. To recall an influential report of the World Bank:

> Most important, we now see that markets and governments are complementary: the state is essential for putting in place the appropriate institutional foundations for markets. And government's credibility the predictability of its rules and policies and the consistency with which they are applied can be as important for attracting private investment as the content of those rules and policies.[29]

As Orford and Beard pointed out, this shift was wrongly interpreted as a welcome U-turn away from neoliberalism, when in fact it constituted a deepening of the neoliberal project.[30] In this very report, the World Bank clearly designated the legitimate scope of state activity:

> A clearer understanding of the institutions and norms embedded in markets shows the folly of thinking that development strategy is a matter of choosing between the state and the market ...

[25] Nozick's understanding of a super-minimal state is taken here as indicative of the libertarian school of thought: R. Nozick, *Anarchy, State and Utopia* (2nd edn, Basic Books, 2013).

[26] J. Buchanan, 'Man and the State' MPS Presidential Talk, 31 August 1986. Quoted in Mirowski (*supra* note 24), 41.

[27] F.A. Hayek and B. Caldwell (eds), *The Road to Serfdom: Text and Materials The Definite Edition* (University of Chicago Press, 2007), 118.

[28] F. A. Hayek and R. Hamowy (eds), *The Constitution of Liberty*: *The Definite Edition* (University of Chicago Press, 2011), 331.

[29] World Bank, 'World Development Report 1997. The State in a Changing World' (1997) Overview, 3.

[30] A. Orford and J. Beard, 'Making the State Safe for the Market: The World Bank's Development Report 1997' (1998) 22 Melbourne University Law Review 195, 196.

> [T]he two are inextricably linked. Countries need markets to grow, but they need capable state institutions to grow markets.[31]

Similarly, in a report on Armenia, the World Bank advocated institutional guarantees for the judiciary because '[b]oth domestic and foreign investors were expected to benefit from an efficient, independent and impartial judiciary thus promoting private sector development and economic growth in Armenia'.[32] These are just two illustrative examples of the fact that international neoliberal projects do not seek to erode the state, nor do they favour unconditionally its minimisation. Rather, these state mechanisms that establish and enforce market relationships and capitalist relations need to be protected and solidified. Further, the World Bank, along with prominent neoliberal theorists, welcomes state intervention in fields that are not immediately profitable for individual capital, but nevertheless enable long-term capital valorisation, for example, in the provision of primary education.[33]

Further, neoliberalism is a project of redesigning the state itself. Under the influence of public choice theory,[34] it is maintained that bureaucracies need to be subjected to the norms of competition and market discipline themselves, in order to optimise their performance. Within this process, citizens are rebranded as 'consumers' and public services need to conform to market principles and subject themselves to competitive processes, either internally or with the private sector. Thus, the state is not just an actor external to competition, but is transformed into an arena of competition itself. Anthony Giddens summarises this turn as follows: '[m]ost governments still have a good deal to learn from business best practice - for instance, target controls, effective auditing, flexible decision structures and increased employee participation'.[35] To return to the international financial institutions (IFIs), the World Bank dictates that even acceptable state activity should be redesigned to conform to the imperatives of the market. In its reports, competition is elevated to the backbone of public administration: 'Competition is the third leg of the broader approach, and there are many ways that competition can spur greater efficiency, transparency, and accountability in government.'[36] In fact, even the concept of public administration is abandoned and 'governance', a hybrid mode of

[31] World Bank (*supra* note 29), para. 38.

[32] World Bank, 'Implementation Completion and Results Report (IDA-34170) on a Credit Amount of SDR 8.6 Million (US$ 11.4 Million Equivalent) to Republic of Armenia for a Judicial Reform Project Report No. ICR0000493' (June 28, 2007).

[33] World Bank, 'World Development Report 1995: Workers in an Integrating World' (1995) paras. 36-40.

[34] Amongst many: G. Tullock, *The Politics of Bureaucracy* (Public Affairs Press, 1965).

[35] A. Giddens, *The Third Way* (Polity Press, 1998), 74-75.

[36] World Bank, 'Reforming Public Institutions and Strengthening Governance: A World Bank Strategy Implementation Update' (April 2002), para. 38.

government that brings together public and private, national and international actors,[37] becomes the conceptual framework for evaluating public services.

This brings us to another aspect of neoliberalism's engagement with the state: the need to separate politics from economics and to ensure that state intervention will only occur to sustain competition, and not to satisfy 'particularistic interests', such as those of organised labour. The neoliberal advocacy for a strong, competitive state operating as a guarantor of the free market indicates neoliberalism's tentative relationship with democracy and, more broadly, with mass politics. Both in theory and in practice, neoliberals have been consistently sceptical towards the concept of a democratic, participatory government. In the inter-war period, German neoliberals also known as ordo-liberals, sided with Schmitt in advocating that the welfarist state of the Weimar era was expansive and simultaneously weak, since it was subjected to 'the united onslaught of interest crowds'.[38] The 'interest crowds' were the rising working-class movement advocating for better working and living conditions, and even for radical social change. For ordo-liberals, a state responsive to these demands was a deeply problematic state that needed to be dismantled. It is important to keep in mind that ordo-liberals had the chance between 1946 and 1949 to partly shape Western Germany in accordance with their views. During that period, Germany was occupied by the Allies and most progressively-minded economists had been eliminated, often physically, during the Nazi era. In 1948, Erhard, a prominent ordo-liberal, served as Director of the Administration for Economics in the Bizonal Economic Council, enjoying powers that even conservative German theorists described as 'dictator like'.[39] The fact that the golden era of ordo-liberalism in Germany was one void of any democratic safeguards confirms that the above mentioned anathemas of ordo-liberals against democracy were far from incidental. American neoliberals can only affirm the suspicion of neoliberalism's anti-democratic inclinations. From the involvement of the 'Chicago boys' to Pinochet's military dictatorship in Chile to Hayek's assertions that liberalism and democracy are indeed potentially compatible, but analytically distinct and if in doubt we should opt for liberalism,[40] the relationship between American

[37] For the first comprehensive account of the concept, see: The Commission on Global Governance, 'Our Global Neighborhood: The Report of the Commission on Global Governance' (OUP, 1995).

[38] A. Rüstow, 'Interessenpolitik oder Staatspolitik' (1932) 6 Der deutsche Volkswirt 171. Ordo-liberals subsequently claimed that they were a locus of resistance against Nazism. This proposition is not easily substantiated. For more: R. Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in Mirowski and Plehwe (*supra* note 3) 112-19.

[39] W. Kaltefleiter, 'Bedingungen für die Durchsetzung ordnungspolitischer Grundentscheidungen nach dem Zweiten Weltkrieg' in W. Fischer (ed.), *Währungsreform und Soziale Marktwirtschaf* (Duncker u. Humblot, 1989), 68.

[40] Hayek summarised this point in his attempt to justify his support for Pinochet's dictatorship: '[A]s long-term institutions, I am totally against dictatorships. But a dictatorship may be a necessary system for a transitional

neoliberals and democratic government has been at best one of tension. My argument here draws from Wendy Brown's thought to argue that there is an inherent tension between neoliberalism and democratic principles.[41] This is because the centrality of competition in neoliberal theory and practice (instead of free exchange in the context of classical liberalism) is fundamentally inimical to the universalist and egalitarian premises of democracy. Unlike free exchange, competition does not necessarily promise a final equilibrium, an amelioration of everyone's position. Competition has its winners and losers and indeed the losers should accept that their marginalisation, poverty and exclusion is their own fault.[42] As a result, '[a] permanent underclass, and even a permanent criminal class, along with a class of aliens or non-citizens are produced and accepted as an inevitable cost of such society.'[43] Furthermore, the neoliberal conceptualisation of the state as yet another terrain for the operation of market relations erodes every concept of 'public good' or citizenship-based solidarity, upon which (liberal) democracy depends.[44]

To conclude, neoliberalism needs to be understood as a response to the intellectual and political bankruptcy of classical liberalism. Still, its emergence to hegemonic ideology and to prevailing governing structure on a global level is linked to structural transformations of the CMP, the profitability crisis of capitalism, the outcome of intense social struggles in Western Europe and, of course, the fall of the USSR.[45] Even though the precise conditions that paved the way for the neoliberal hegemony are not the focus of this analysis, it is significant to bear in mind that, despite the

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period. At times it is necessary for a country to have, for a time, some form or other of dictatorial power. As you will understand, it is possible for a dictator to govern in a liberal way. And it is also possible for a democracy to govern with a total lack of liberalism. Personally, I prefer a liberal dictator to democratic government lacking in liberalism.' Interview for *El Mercurio* (19 April 1981), reproduced in A. Farrant, E. McPhail and S. Berger, 'Preventing the "Abuses" of Democracy: Hayek, the "Military Usurper" and Transitional Dictatorship in Chile?' (2012) 71 American Journal of Economics and Sociology 513, 521.

[41] W. Brown, 'Neo-liberalism and the End of Liberal Democracy' (2003) 7 Theory and Event 1; W. Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratisation' (2006) 34 Political Theory 690; W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015).

[42] 'Instead of being frank about the fact that the extraordinary chances of gain which the game of the market economy offers for the good players are accompanied by chances of losing for those who are less capable or less fortunate, and that all those who want to participate in this game are obliged to take their chance, the propaganda [of classical liberalism] promised prosperity and happiness to all without exception.' W. Roepke (with an appendix by A. Ruestow), *International Economic Disintegration* (William Hodge and Company, 1942), 271.

[43] Brown, 'American Nightmare', (*supra* note 41), 695.

[44] 'Liberal democratic practices and institutions almost always fall short of their promise and at times cruelly invert it, yet liberal democratic principles hold, and hold out, ideals of both freedom and equality universally shared and of political rule by and for the people.' Brown, *Undoing the Demos*, (*supra* note 41), 18.

[45] For the material conditions that enabled the rise of neoliberalism, see generally: Harvey (*supra* note 2).

marked differences the rise of neoliberalism brought about, the phenomenon needs to be conceptualised as symptomatic of capitalist transformation. Further, neoliberalism was fundamentally an attempt to rectify the simplistic *laissez-faire* assumptions of classical liberalism that eventually led to its political and conceptual demise and triggered a profound crisis of capitalism. Despite certain anti-statist slogans, neoliberals appreciated the role of intervention in constructing, maintaining and expanding competitive markets. Even though most of their writing focused on state intervention, neoliberals were also interested in the interplay between domestic and international (legal) orders in the construction of the said competitive markets. The next section of this chapter will focus precisely on this question.

5:2 International law and international institutions in the context of neoliberal thought: disciplining the state, delimiting democracy

The problematisation of democratic and mass politics by neoliberalism sketched above has direct implications for international law and international institutions. In 1954, the ordo-liberal thinker Roepke was invited to The Hague to deliver a lecture on economics and international law.[46] In his *Recueil des Cours* lecture, Roepke provided us with some thoughts about the history of international law since the nineteenth century and criticised the demise of this international legal order due to the rise of the Keynesian state. In his own words, the difficulty in constructing a truly global economic order lays with the fact that 'there is no world government, and therefore the world economy lacks a genuine world legal order which imposes identical norms and which enforces them by *immediately effective sanctions*'.[47] Nonetheless, before 1914, this problem was rectified in practice by the operation of the gold standard, the depoliticisation of the economy and international law. The first factor safeguarded the existence of 'a generally acceptable, free and stable currency',[48] while the much-celebrated distinction between politics and economics meant that there existed a high degree of uniformity between different national legal systems.[49] What he, unsurprisingly, failed to mention was that this uniformity concerned a small number of Western states, while deviations from this homogeneity were enough to deprive a political community from the status of 'civilised', and therefore from the status of 'sovereign', and were 'corrected' through practices such as extraterritoriality.[50] Finally, according to Roepke, international treaties were 'surrounded by an air of

[46] Roepke (*supra* note 21).

[47] Ibid., 219 (emphasis added).

[48] Ibid., 218.

[49] Ibid., 223.

[50] See generally Chapter 2 'Extraterritoriality and the civilising mission: international law and social transformation in Japan and the Ottoman Empire' of this thesis.

sanctity'[51] since all 'civilised' states adhered to them. Most-favoured-nation clauses, non-discrimination and respect for property rights held this international order together.

According to this narrative, this international order started collapsing when the purported distinction between politics and economics started disintegrating. In a discursive move very common in neoliberal thought, trade unions and popular government were blamed for this trend.[52] Thus, for Roepke, it was urgent to limit national sovereignty, which in his account is at least partly synonymous to popular sovereignty: '[t]o diminish national sovereignty is most emphatically one of the urgent needs of our time. But the excess of sovereignty should be abolished instead of being transferred to a higher political and geographical unit.'[53] Otherwise put, the rise of international law and international institutions was not seen as a process of simply transferring functions from the national to supra-national levels. Rather, this very process disciplined the state and re-drew the limits between acceptable and unacceptable modes of state (and more broadly institutional) intervention in the economy. Sinclair has articulated a similar argument focusing on how international organisations had already dictated acceptable forms of statehood since the nineteenth century.[54] However, Sinclair focuses on the 'cultural' aspect of this disciplining process, arguing that international organisations promote a Western model of statehood: '[T]his article argues that IO growth has been imagined and carried out as necessary to the ongoing process of making modern states on a broadly Western model'.[55] This approach echoes Anghie and, therefore, is characterised by the same weaknesses that were criticised in Chapter 1 of this thesis.[56] It is worth bearing in mind that Roepke's turn to international law and institutions did not target 'culturally alien' political communities; nor was it employed predominately against the colonies. Rather, for neoliberal thinkers, the internationalisation of economic governance was a method for confronting the Keynesian state and, at a more fundamental level, for undoing the impact of mass politics, the democratisation of economic decision-making, and the rise of working class militancy and of the political Left. It is telling that, in the

[51] Roepke (*supra* note 21), 222.

[52] 'This tendency is furthered by certain policies of trade unions which, in spite of internationalist lip-service, tend to promote national isolation of labour and commodity markets.' Ibid., 233.

[53] Ibid., 250.

[54] 'Most IOs and states were born and grew up together during the past century; it might seem equally plausible, then, to think of IOs as shaping states. Accordingly, it would be overly simplistic to assume that IO growth has necessarily resulted in a loss of sovereignty by states. To the contrary, I contend that IO growth is intimately bound up with the creation of states, the construction of state powers and the very constitution of modern statehood.' Sinclair (*supra* note 6), 447.

[55] Ibid.

[56] For a critique of the argument that equates nineteenth century 'civilisation' hierarchy with cultural difference, see Section 1:3:1 'Civilisation v. Culture: The broader origins of the concept and its emphasis on institutions' in the present thesis.

concluding remarks of his Hague lectures, Roepke clarifies that the constitution of this international legal order is not a neutral act, but is fundamentally incompatible with certain forms of government. In his case, these clearly encompassed both socialism and the democratic Keynesian state: 'we have to make up our minds whether we can go on with certain national economic policies, which, however popular and tempting, are shown to be incompatible with that order'.[57]

Roepke was not alone in these reflections about the importance of internationalised economic governance. In the 1930s, Hayek reflected systematically on the question of an international capitalist federation that would secure international order, prevent conflict and roll back welfarist interventionism.[58] In fact, Hayek joined the Federal Union,[59] an organisation founded in 1938 with the platform that a world federation was essential for avoiding war, and tried to advocate for his firmly capitalist vision of such a federation at a time when left-wing federalism was particularly popular.[60] For Hayek, this federation would be inter-linked with the restraint of independent economic decision-making for its member-states.[61] Areas such as monetary policy would be delegated to the federation and, in fact, Hayek envisaged a constitutional framework that would guarantee the (neo)liberal nature of the federation and discipline national democracy in compliance with individual freedom and a competitive economic order.[62] Hayek's aversion towards democratic, mass politics was central in his

[57] Roepke (*supra* note 21), 255.

[58] F. A. von Hayek, 'Economic Conditions of Inter-state Federalism' (1939) 5 New Commonwealth Quarterly 133, reprinted in F. A. von Hayek, *Individualism and Economic Order* (University of Chicago Press, 1948). Hayek also discussed the topic in the—rarely discussed—last chapter of *The Road To Serfdom*: Hayek (*supra* note 27). For an overview of Hayek's federalist thought, see: J. Spieker, 'F. A. Hayek and the Reinvention of Liberal Internationalism' (2014) 36 International History Review 919.

[59] Ibid., 920. For a detailed account of the history of the Federal Union, see: O. Rosenboim, 'Barbara Wootton, Friedrich Hayek and the Debate on Democratic Federalism in the 1940s' (2014) 36 International History Review 894, 902-06.

[60] 'Left-wing views within the movement were manifestly strong, especially in its early years, and several other influential members of the organisation agreed with this assessment. R. W. J. Mackay insisted that federation was a strictly political union which does not necessarily determine social and economic organisation.' Spieker (*supra* note 58), 926-27.

[61] Ibid., 927.

[62] 'The basic clause of such a constitution would have to state that, in normal times, and apart from certain clearly defined emergency situations, men could be restrained from doing what they wished, or coerced to do particular things, only in accordance with the recognized rules of just conduct designed to define and protect the individual domain of each'. F. A von Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, 1993), 108-09. 'The international Rule of Law must become a safeguard as much against the tyranny of the state over the individual as against the tyranny of the new superstate over national communities.' Hayek (*supra* note 27), 235.

federalist plans. This becomes clearer if we compare Hayek's federalist vision to that of another notable inter-war neoliberal federalist, Lionel Robbins.[63] Even though Robbins argued against the Keynesian policies of his time, maintaining that they aggravated the crisis and that they would inevitably lead to war, his federalist plans allowed for governmental restrictions on trade provided that they were the 'the result of majority decisions'.[64] Tellingly, no such exception is provided for in Hayek's federalist writings. As Spieker points out, 'for him, democratic government was more firmly subordinated to the principles of economic liberalism'.[65] In Hayek's own words, his vision of federalism was a democratic one, yet this was 'a democracy with definitely limited powers'.[66]

To take this argument one step further, Hayek's federalist vision was also conditioned upon the political orientation of such a federation. Hayek saw this internationalisation of economic management as a means to an end, the end being the construction of a neoliberal legal and economic order: '[t]his division of power would inevitably act at the same time also as a limitation of the power of the whole as well as of the individual state. Indeed, many kinds of planning which are now fashionable would probably become altogether impossible.'[67] Conversely, he was happy to postpone the realisation of his plans to avoid the emergence of a Keynesian federation: 'the creation of a world state probably would be a greater danger to the future of civilisation than even war'.[68] For Hayek as well as for Roepke,[69] the legalised internationalisation of economic decision-making was not primarily about the actors that would exercise these powers (international instead of national), but rather about delimiting, channelling and disciplining of these powers in the first place: '[t]he powers which must devolve on an international authority are not the new powers assumed by the states in recent times but the minimum of powers without which it is impossible to preserve peaceful relationships, i.e., essentially the powers of the ultra-liberal "*laissez-faire*" state'.[70]

However, Hayek's above-described federation of political equality and economic frugality was not exactly a global one. Rather, it was conceptualised as a federation between Western, capitalist states that would largely retain their colonies. In his 1939 essay on federalism, Hayek discussed briefly whether colonies should be administered federally or nationally, concluding that the former solution

[63] Lionel Robbins was a notable LSE economist who advocated against interventionist policies at the face of the Great Depression. He largely shared Hayek's federalist vision: L. Robbins, 'Economic Aspects of Federation' in M. Chaning-Pearce (ed.), *Federal Union: A Symposium* (J. Cape, 1940).

[64] Ibid., 174.

[65] Spieker (*supra* note 58), 928.

[66] Hayek (*supra* note 27), 232.

[67] Ibid., 233.

[68] Hayek (*supra* note 28), 380.

[69] See note 56 above.

[70] Hayek (*supra* note 27), 232.

was preferable, given his overall preference for post-national, federal structures of economic governance.[71] This unproblematised discussion of the colonial question indicates his acceptance of the colonial *status quo*, and in fact Hayek characterised the issue of colonial administration as being of 'comparatively minor importance'.[72] Similarly, unproblematised references to colonial relations and the fact that federalism would only be applicable between Western states can be found in *The Road to Selfdom*: 'I believe that these considerations still hold and that a degree of cooperation could be achieved, say, between the *British Empire* and the nations of Western Europe and probably the United States which would not be possible on a world scale.'[73] After all, Hayek praised the internationalist thought of nineteenth-century liberal thinkers such as Sidgwick,[74] who was a staunch believer in the distinction between 'civilised' and 'uncivilised' nations.[75] Even though he was not an outright supporter of (neo)liberal interventionism,[76] Hayek in his later writings adopted an evolutionary approach to human history that enabled him to conceptualise possessive individuals as the highest stage of human development. Thus, he suggested that, for all societies to develop towards this allegedly higher stage of civilisation, one needed to establish the (institutional and legal) framework that would enable individual initiative to flourish.[77] Arguably, this idea that it is justified to impose the conditions necessary for a neoliberal conception of individual initiative to emerge closely echoes the 'civilisational' efforts of the nineteenth and early twentieth century and more specifically, extraterritoriality,[78] as well as the workings of the mandate system of the League of Nations.[79] For

[71] Hayek (supra note 58), 269.

[72] Ibid.

[73] Hayek (*supra* note 27), 235 (emphasis added).

[74] 'Nineteenth-century liberals may not have been fully aware of *how* essential a complement of their principles a federal organization of the different states formed; but there were few among them who did not express their belief in it as an ultimate goal.' Ibid., 234. 'As late as the closing years of the nineteenth century Henry Sidgwick thought it not beyond the limits of a sober forecast to conjecture that some future integration may take place in the West European states.' Ibid., 234, fn14.

[75] 'Sidgwick conceives of international relations as a two-tiered hierarchical system in which the relations among liberal states are governed by the principle of equality, while the relations between liberal and non-liberal states are conceptualised in imperial terms. As has been noted elsewhere, Sidgwick's vision of a liberal federation was constrained by a justification of imperialism based on a cultural understanding of racial difference: "liberal internationalism and liberal imperialism went hand in hand".' Spieker (*supra* note 58), 933.

[76] 'Whatever kind of civilisation will in the end emerge in those parts under Western influence may sooner take appropriate forms if allowed to grow rather than if it is imposed from above.' F. A. von Hayek, *The Constitution of Liberty* (Routledge Classics, 2006), 2.

[77] 'If it is true ...that the necessary condition for a free evolution - the spirit of individual initiative - is lacking, then surely without that spirit no viable civilisation can grow anywhere.' Ibid.

[78] See Chapter 2 'Extraterritoriality and the civilising mission: international law and social transformation in Japan and the Ottoman Empire' in the present thesis.

Hayek as well as colonial administrators and international lawyers before the Second World War, it was necessary and legitimate for developed capitalist states to further these reforms that constituted the necessary preconditions for the establishment of a capitalist society. The crucial difference here, though, is that Hayek had an even more narrow conception of the desired outcome of such reforms. Both his above-described federation and this tutelage relationship with 'less advanced' political communities needed to be not only capitalist, but specifically neoliberal. In turn, this vision not only resonated with the history of international law, but also paved the way for its future, legitimising a number of international legal innovations, and amongst them a distinctive model of neoliberal international territorial administration.

Thus far, neoliberal thought on international law and governance has largely been neglected. This section sought to ratify this omission by arguing that, despite marked differences, we can trace significant similarities in the way Roepke and Hayek argued for the need to internationalise and legalise economic decision-making. Further, their vision of the international order was closely linked to their vision of the state. In order to ensure that the role of the state would be strictly confined within the limits of the creator and the guarantor of competitive orders, a process of disciplining state power was necessary. There are manifold aspects of this disciplinary process. What is of interest to international lawyers is that the internationalisation of economic decision-making was understood as one method capable of securing this disciplining by restraining national sovereignty. Further, the hostility of neoliberal thinkers towards mass politics, democratic institutions and organised labour signifies a partial overlap between national and popular sovereignty. Otherwise put, for neoliberals, the state had become too vulnerable to popular demands for welfarist, anti-competitive interventionism and, therefore, only a re-arrangement of institutional functions could restore its 'proper' functions. As we will see in the next section, this understanding had profound implications for the role of international law and international institutions after 1990.

5:3 The rise (and fall?) of international territorial administration: building a world safe for neoliberalism

Despite its deep historical lineages, neoliberalism became hegemonic on an international level in the course of the 1990s. The 1973 oil crisis triggered significant changes in Western Europe and the US. The most relevant here is the 1976 'Sterling crisis' in the UK and the decision of the Labour government to turn to the IMF for assistance. It was from this point - and not in the course of the Latin American debt crisis in the 1980s - that the IMF assumed a proactive role in prescribing pro-cyclical, austerity policies as conditionalities for the provision of loans.[80] Still, the 'debt crisis' in the

[79] See Section 3:2:1 'Article 22: continuation of the civilising mission by other means' in this thesis.

[80] 'The new Prime Minister, James Callaghan, and Chancellor of the Exchequer, Denis Healey, were Atlanticists who were in favour of negotiations with the IMF, which had already provided temporary assistance. Further

course of the 1980s signalled the death knell of the NIEO, since a number of peripheral states that had advocated for it were obliged to implement neoliberal reforms, in order to be assisted by the IMF or the World Bank (also collectively known as the International Financial Institutions, or IFIs).[81] Finally, the collapse of the USSR solidified the trend by providing neoliberal theorists and policy-makers with unprecedented confidence. The impact of these events on international law and institutions was nothing short of seismic. From international trade[82] and investment law,[83] to international criminal law[84] and the law of international institutions,[85] a distinctively neoliberal international legal order began to be formulated. Theorists like Gill even argued that certain regimes of international law acquired the character of an internationalised neoliberal 'constitution'.[86] Moreover, the collapse of the

help, however, would only come with strings attached. When they prevailed, it was much more than a defeat for the British left, the unions, and the working class. It was the first step in the capitalist reconstruction of the West.' Mazower (*supra* note 1), 346.

[81] 'The final dagger would be the Latin American debt crisis in 1982: bailing out indebted southern states was not done in charity but conditionally dependent on structural adjustments designed explicitly to weaken the reach of the state. The result was a ''lost decade'' in Latin America, and then another in Africa when the same policies were applied there.' Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 Humanity 1, 8. The example of Peru is illustrative. In its first encounter with the IMF in 1982-1983, the state experienced a 14% drop of its per capita GDP and the loss of 400,000 jobs, which pushed the Fund out. The Fund returned in the early 1990s and its policies contributed to Peru becoming the fastest growing state in the region. At the same time, social indicators deteriorated rapidly: real wages fell, poverty and inequality rose, the government exhibited clear authoritarian characteristics. It is telling that within six months the protein intake in Peru's capital city, Lima, fell by 30%: D. Green, *Silent Revolution: The Rise and Fall of Market Economics in Latin America* (New York University Press, 2003), 255.

[82] Among many: Lang (*supra* note 14).

[83] Among many: D. Schneiderman, *Constitutionalizing Economic Globalisation: Investment Rules and Democracy's Promise* (CUP, 2008); M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, 2015).

[84] Among many: K. M. Clarke, '"We Ask for Justice, You Give Us Law": Justice Talk and the Encapsulation of Victims' in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Courts Interventions* (CUP, 2015); C. Schwoebel, 'Market and Marketing Culture of International Criminal Law' in C. Schwoebel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014).

[85] Among many: A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2001) 32 New York University of International Law and Politics 243; B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004)15 European Journal of International Law 1.

[86] S. Gill, 'New Constitutionalism, democratisation and global political economy' (1998) 10 Pacifica Review: Peace, Security and Global Change 23; S. Gill and A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP, 2014).

USSR and the fact that the 1990s was a decade of geopolitical decline and economic collapse for Russia signified the (interim) end of the widespread use of veto by the five permanent members, the 'revival' of the UN Security Council and the eve of a new interventionist era. Indeed, Orford has contended that the expansion of the UN collective security system was one of the two most significant developments in international law and international relations after the end of the Cold War, the other being increased trade and financial liberalisation.[87] This emergence of a specifically neoliberal international law will also be discussed in Chapter 6.[88]

5:3:1 After the 'end of history': international territorial administration in the years of triumphant neoliberalism

This chapter will conceive, in line with Stahn, international territorial administration (ITA) as 'the exercise of administering authority (executive, legislative or judicial authority) by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose'.[89] Further, modern ITA arose as the corollary of the above-mentioned intensified activity of the UNSC in the field of collective security.[90] Here we need to take into account that Wilde has gone to significant lengths to show that there is nothing particularly unique about post-1990s ITA.[91] There is definitely truth to the argument that ITA as a form of governing is not entirely new. However, if we focus on the internationalisation aspect only, we miss the fact that different ITA experiments have served diverse social, economic and political purposes and have been embodied in radically different international legal paradigms. ITA might be a temporary solution in order to manage a problem of competing nationalisms, as in the case of Danzig In that instance, the League of Nations acted as the 'protector' of the semi-autonomous city, in an attempt to reconcile the fact that the city was overwhelmingly inhabited by ethnic Germans, but Poland would not accept its incorporation to Germany, since it would deprive it from access to the Baltic Sea.[92] Hence, internationalisation operated as a compromise in the light of incompatible geopolitical interests. ITA might also be a temporary management of territory before the final settlement of its status, as in the case of Eastern Slavonia, which was administered by the United Nations Transitional Administration for Eastern Slavonia (1996-1998), before returning to the control

[87] A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 Harvard International Law Journal 443, 443.

[88] See Section 6.1. Resolution 1483 and its legal implications: the laws of occupation and neoliberal legality of the present thesis.

[89] C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP, 2010), 44-45.

[90] Ibid., 27.

[91] R. Wilde, 'Taxonomies of International Peacekeeping – An Alternative Narrative' (2003) 9 ILSA Journal of International and Comparative Law 391.

[92] Stahn (*supra* note 89), 182-185.

of Croatia.[93] Finally, ITA can represent comprehensive international tutelage involving intense economic and political reforms, as was the case frequently after 1990. This chapter will focus exclusively on the last category: the subject of my analysis here is a form of specifically neoliberal ITA. However, a phenomenon can be both singular and part of a broader historical lineage. In this thesis, it is argued that post-1990 ITA should be understood as method of sustaining and expanding capitalist relations, and more specifically neoliberal capitalism, in a post-colonial world of equal sovereignty. This conceptualisation enables us both to distinguish between different instances of ITA without fetishising the mere form of internationalised governance, while capturing the continuities between ITA and, among other examples, the Mandates System of the League of Nations or nineteenth-century extraterritoriality, as does this thesis.

Indeed, it is the case that a heavy focus on economic reform first arose as a core characteristic of ITA after 1990.[94] In fact, both the increased frequency and complexity of ITAs led to (eventually unsuccessful) efforts to establish a Peacebuilding Commission as part of the UN system.[95] This turn to a proactive, intrusive model of ITA is commonly attributed to the ideological hegemony of 'democratic peace theory' after 1990.[96] Democratic peace theory prides itself in drawing from the

[93] R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP, 2008), 53-54.

[94] 'The inclusion of economic aspects in comprehensive peacebuilding missions is a very recent phenomenon in international law. The addition can be seen as underlying a tendency to recognise the economic dimension of international peace and security.' E. de Brabandere, *Post-conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff Publishers, 2009), 148. 'In recent years, the UN Security Council has been adopting increasingly broad and complex peace mission mandates, going well beyond the simple maintenance or re-establishment of peace. In particular, the UN has assumed tasks of political and economic reconstruction, now incorporated under the lofty concept of peacebuilding.' L. Boisson de Chazournes, 'Taking the International Rule of Law Seriously: Economic Instruments and Collective Security' *International Peace Academy Policy Paper* (October 2005), 8.

[95] UNGA Resolution 60/180 'The Peacebuilding Commission' A/RES/60/180 (30 December 2005); UNSC Resolution 1645 S/RES/1645 (20 December 2005). For a brief analysis, see: M. Berdal, 'The UN Peacebuilding Commission: The Rise and Fall of a Good Idea' in M. Pugh, N. Cooper and M. Turner (eds), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Palgrave Macmillan, 2008).

[96] 'The hubris of peacebuilders keys the political economy of war-torn societies into a map captioned "the liberal peace project;" that, in its economic dimension, requires convergence towards "market liberalisation." This became an aggressively promoted orthodoxy, with variations, derived from the late 1990s Washington Consensus.' M. Pugh, 'The Political Economy of Peacebuilding: A Critical Theory Perspective' (2005) 10 International Journal of Peace Studies 23, 23. Examples drawn from ITA feature prominently in Buchan's analysis of democratic peace theory and international law as examples of the intersection between the two:

Kantian tradition,[97] as renewed by Wilson during the interwar period.[98] The theory was, in essence, an attempt to develop a competing theory to Realism by claiming that 'state preferences derived from the domestic and transnational social pressures critically influence state behaviour'.[99] Doyle elaborated this theory by arguing that democracies do not go to war with each other, having established between them a zone of liberal peace.[100] In contrast, non-liberal states go to war against each other, while liberal democracies are still likely to go to war against non-liberal states. For Doyle, this latter fact is attributable to liberal democracies' conviction that non-liberal states are inherently aggressive, since 'non-liberal states are in a permanent state of aggression against their own people'.[101] In turn, this domestic behaviour is understood as an indicator of a state's external behaviour and 'non-liberal states are expected to externalise this domestic aggressive behaviour when interacting in the international sphere'.[102] Thus, in the context of democratic peace theory, it is both normatively desirable and empirically observable that liberal states systematically try to expand this sphere of liberal peace by promoting (whether through peaceful or forcible means) liberal democracy.[103] This diffusion of

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'[t]hus, whereas during the Cold War the UN was adamant that peacekeeping missions would not become involved in domestic political matters, in the post-Cold War era the UN's political bias in favour of liberal democracy has become overt.' R. Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing, 2013), 127.

[97] This genealogical line is common but debatable to the extent that Kant focused on republicanism and not on liberalism, let alone democracy. See: I. Kant, 'Perpetual Peace' in I. Kant, *Political Writings* (H. Reiss ed, 2nd edn, CUP, 1991).

[98] W. Wilson, 'Fourteen Points' (8 January 1918) Available at: http://avalon.law.yale.edu/20th_century/wilson14.asp (Last accessed: 11/05/2015). For the most comprehensive critique to the liberal theory and practice of the interwar period, see: E.H. Carr, *The Twenty Years' Crisis, 1919-1939* (Palgrave Macmillan, 2001).

[99] A. Moravcsik, 'The New Liberalism' in C. Reus-Smit and D. Snidal (eds), *The Oxford Handbook of International Relations* (OUP, 2008), 236.

[100] *'[E]ven though liberal states have become involved in numerous wars with non-liberal states, constitutionally secure liberal states have yet to engage in war with one another'* M. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part I' (1983) 12 Philosophy and Public Affairs 205, 213 (emphasis in original).

[101] M. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, Part II' (1983) 12 Philosophy and Public Affairs 323, 325.

[102] Buchan (*supra* note 96), 79.

[103] 'For this reason, liberals argue that liberal states should act in concert on the international stage, seeking to promote their liberal values to non-liberal states in order to defend and expand their zone of liberal peace.' Ibid., 3; 'In particular, Andrew Moravcsik and Anne-Marie Slaughter have both dedicated much academic energy to presenting liberalism as empirical, scientific and non-normative. Their argument is that liberalism has made the transition from a normative theory which makes recommendations about how liberal states should interact with

political and economic liberalism is morally desirable since it represents 'a system of governance that is universally desirable'.[104] Simultaneously, it is the only rational foreign policy for liberal democracies, since international peace and security will always be threatened by the existence of non-democratic states that do not abide to liberalism and a free-market economy. Crucially, democratic peace theory was also endorsed by the UN Secretary- General, Boutros Boutros-Ghali.[105]

A fundamental addition needs to be made in order to comprehend fully the emergence of neoliberal peacebuilding. Apart from democratic peace theory, we must also factor in the neoliberal aversion towards national interventionism and the preference for internationalised schemes of decision-making, as sketched above.[106] Otherwise, if one relies solely on the predominance of democratic peace theory, it is not readily clear why it was *international* actors, such as international institutions or internationally-recognised occupying powers, which assumed such a central role in promoting those economic and political reforms deemed necessary for the establishment of long-lasting peace. Even though democratic peace theorists favour (neo)liberal capitalism,[107] their nominal focus is on domestic political arrangements involving a minimum of free elections and guarantees of basic rights. Neoliberals, such as Hayek, Robbins or Roepke, advanced a similar, yet more ambitious, argument: for them, the interventionist state was fundamentally incompatible with a genuine, stable and peaceful international order.[108] Furthermore, as has been shown already, neoliberals clearly favoured internationalised schemes of economic governance, since they considered them ideal, in order to diminish the impact of organised labour, mass politics and the political left on decision-making.[109] It was in this context that, as Orford points out, the local/national level was reconceived as a source of conflict, strife and disorder, while international law and institutions were reconceptualised as a solution to those problems: '[t]he second assumption made by advocates of an expanded humanitarian role for the Security Council is that the principal threats to human rights, democracy, and security

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other states in the world order to an explanatory theory that is able to accurately account for how liberal states *do* interact with other states.' Ibid., 40 (emphasis in original).

[104] Ibid., 80.

[105] In his relevant report, Boutros Boutros-Ghali argued that 'a culture of [liberal] democracy is fundamentally a culture of peace.' UN Secretary-General Boutros Boutros-Ghali, 'An Agenda for Democratization' UN Doc A/51/761 (20 December 1996) para. 17.

[106] See: 'International law and international institutions in the context of neoliberal thought: disciplining the state, delimiting democracy' above.

[107] For example, in the context of the occupation of Iraq in 2003, Buchan argued that: 'Thus, for Iraq to be transformed into a liberal democracy it was necessary to engage in a profound market-orientated economic adjustment, taking a "leap into robust capitalism".' Buchan *(supra* note 93), 198.

[108] See notes 57, 58 above.

[109] See notes 53, 65, 66 above.

occur at the state or local level'.[110] However, as Orford also proceeded to show, in numerous cases of conflicts the international law and institutions were far from 'absent' or 'inactive'. To give but one example, it was under sustained pressure from the IMF that the former Yugoslavia changed its republican, federal structure, transferring powers to the central government while simultaneously implementing austerity politics with divisive social consequences.[111] In turn, these reforms provoked nationalist feelings that eventually led to the outbreak of the civil war.[112] Furthermore, Orford argues that IFIs or liberalising trade agreements have decisively contributed to the weakening of democracy and to systematic violations of human rights.[113] Therefore, without this excusing local actors or wholly explaining the occurrence of conflicts, it nonetheless shows that '[r]esponsibility for that violence belongs to both international and local actors, not to local actors alone'.[114] Apart from post-conflict ITA, this mode of thinking also became obvious in different branches of international law, such as international criminal law or with regard to the 'responsibility to protect', where the 'unwillingness' or 'inability' of the state to act appropriately 'triggers' the involvement of international actors, be it the ICC or the UN Security Council.[115] The possibility of international actors being 'unwilling or unable' or even partly responsible for whatever tragedy is occurring at a particular moment is simply not accounted for, while the national level is conceptualised as one of at least partial failure, oppression and conflict. As has been argued already, this faith in international law and organisations to manage successfully conflicts and other disastrous events takes little—if any—

[110] Orford (*supra* note 87), 449.

[111] Ibid., 455.

[112] 'People began to look to other sources of community, and in that vacuum ethnic nationalism re-emerged to provide a new form of community and a needed structure of identity.' Ibid., 457. For an argument on how the IFIs and multilateral development assistance triggered conflict and genocide in Rwanda, see: R. Andersen, 'How Multilateral Development Assistance Triggered the Conflict in Rwanda' (2000) 21 Third World Quarterly 441; A. Storey, 'Structural Adjustment, State Power & Genocide: The World Bank & Rwanda' (2001) 28 Review of African Political Economy, 365.

[113] Orford (*supra* note 87), 464-471.

[114] Ibid., 459.

[115] 'In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.' UN General Assembly Resolution 60/1 2005 World Summit Outcome A/RES/60/1, para 139; 'Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'. Article 17 para. 1 Rome Statute of the International Criminal Court (1998) 2187 UNTS 90/37 ILM 1002.

stock of the fact that these conflicts or disasters are at least partly attributable to international law and organisations in the first place.

Finally, this turn to comprehensive forms of ITA gave rise to significant doctrinal questions. The most readily relevant here is whether the laws of occupation apply in cases of ITA created under an international agreement or by the UN Security Council. Laws of occupation, as incorporated in the Hague Regulations and the Fourth Geneva Convention, and reflected in customary law, are conservative in the literal sense of the word. The core idea behind the laws of occupation remains the fact that the occupier exercises physical control over a territory, but does not acquire sovereign rights over it, and hence is not allowed fundamentally to alter its political order.[116] To begin with, Article 43 of the Hague Regulations reads as follows: '[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.[117] This is accompanied by Article 64 of the Fourth Geneva Convention 1949 (GCIV) which stipulates that local penal laws must remain in force unless 'they constitute a threat to its security or an obstacle to the application of the present Convention'.[118] Even though the exact scope of Article 64 GCIV is open to debate,[119] the provision appears to confer the occupying power with broader legislative authority, so as to ensure that local laws will not impair the perceived humanitarian purposes of the GCIV.[120] For instance, local laws that authorise grave violations of human rights can, and in fact must, be repealed.

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[116] 'Thus, as Schmitt observed, the legal institution of *occupatio bellica* recognizes a direct relationship of protection and obedience between the occupying power's military commandant and the territory's inhabitants, potentially mediated by local laws and institutions but in the last instance arising from the occupant's "naked power", which is at once legitimised and constrained by international law's precarious balance of "military necessity" and order preservation.' N. Bhuta, 'The Antinomies of Transformative Occupation' (2005) 16 European Journal of International Law 721, 727.

[117] Article 43 *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land* (18 October 1907).

[118] Article 64 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 6 UST 3516, 75 UNTS 287 (hereinafter GCIV).

[119] E. Benvenisti, *The International Law of Occupation* (2nd edn, OUP, 2012), 95-102.

[120] 'The third difference between the Hague and Geneva approaches, and which derives from the second one, relates to the structure of the occupant's duties and powers. The occupant must be a proactive regulator, no longer the disinterested watch guard envisioned in the Hague Regulations.' Ibid., 74. These duties include: 'to respect, among other things, the protected persons' honor, family rights, religious convictions and practices, and manners and customs (Article 27), to facilitate the proper working of all institutions devoted to the care and education of children (Article 51), provide specific labor conditions (Article 52), ensure food and medical

To return to ITA, there are numerous 'technical' legal arguments advanced for and against the applicability of the laws of occupation in such cases. The UN, being a non-state actor, has not ratified the Hague Regulations or the GCIV. In fact, it is a stated - if contested - position of the International Committee of the Red Cross that, as a matter of principle, non-state actors are incapable of becoming parties.[121] The situation became increasingly problematic, since the UN started assuming functions virtually indistinguishable from those of an occupying power after 1990, as will be shown below. The doctrinal discussion gets further complicated, incremental and inconclusive, if we factor in the wording of the different Security Council Resolutions that established ITA schemes. Given the hierarchy between international legal rules and the superior position of Charter-based obligations established by Article 103 UN Charter,[122] Security Council resolutions could supersede obligations under international humanitarian law, even if we consider IHL to be applicable in the first place. Even if an explicit authorisation to violate the laws of occupation would be unlikely, the Security Council Resolution 1244 on Kosovo authorised the interim administration to develop 'democratic self-governing institutions' and aimed for

> [a] comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.[123]

It is difficult to see how these objectives could be achieved without contravening the 'conservationist principle' of the laws of occupation, as sketched above.[124]

Without ignoring the importance of this doctrinal conversation, my argument is that it is impossible to understand the relationship between ITA and the laws of occupation without taking into account the hegemony of the democratic peace theory and of neoliberalism during the first two post-Cold War decades. One need not be a believer in radical legal indeterminacy[125] to acknowledge that it is not

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supplies of the population (Article 55), maintain medical services (Article 56), and agree to relief schemes and to facilitate them by all means at its disposal (Article 59).' Ibid.

[121] 'Only States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols.' International Committee of the Red Cross, 'International Humanitarian Law: Answers to your Questions' 2002, 12.

[122] Article 103 UN Charter reads as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Charter of the United Nations 1 UNTS XVI (24 October 1945).

[123] UN Security Council Resolution 1244 (10 June 1999) S/RES/1244 (1999).

[124] See notes 111-115 above.

[125] For the most comprehensive account on legal indeterminacy, especially in its radical form, see: D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976)89 Harvard Law Review 1685.

readily evident or uncontested what measures are indeed essential for the restoration of 'public order and security' and, therefore, are permissible under the laws of occupation. After all, the 'conservationist principle' was reflective of the general consensus of the time of its promulgation about the separateness between economic life and public authority, domestic or foreign.[126] Hence, Article 43 of the Hague Regulations especially is based on a presumption of separation of interests between the occupying power and private actors in occupied territories.[127] Nonetheless, as has already been argued, neoliberalism (and Keynesianism) arose precisely as a response to the political and intellectual bankruptcy of this simplistic and inaccurate *laissez-faire* understanding.[128] The evolution of hegemonic conceptions of the relationship between the market and the state is to an extent evident in Article 64 GCIV and in the GCIV more generally, which grant much broader powers to the occupying power, acknowledging the unattainability of the belief that private life could even continue unhindered under new public authority.[129]

My argument here is that the hegemony of neoliberalism in the international realm after 1990 enabled a more proactive, interventionist interpretation of the state and the market, and reconceived the former as an essential enabler of the latter. Further, the emergence of the democratic peace theory intrinsically bound questions of internal political and economic organisation to issues of international peace and security. For proponents of this approach, the establishment of liberal democracy and capitalism constitute absolutely essential preconditions for a secure and peaceful international environment. The applicability and normative scope of the laws of occupation *vis-à-vis* ITA also need to be examined in this light. This does not imply that the change of the ideological underpinning of the international legal order meant that the laws of occupation are no longer legally binding. However, an approach that does not account for the rise of neoliberalism and 'democratic peace theory' assigns a supposedly neutral and objective meaning to the question of what measures and legal reforms are necessary for the maintenance of order and security, and ignores the importance of ideological factors and material relations of power for the construction of legal meaning. The *aporias* of this approach will become more evident when discussing the neoliberal reconstruction of Iraq and international law in Chapter 6 of this thesis.[130]

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[126] Benvenisti (*supra* note 119), 70.

[127] Ibid.

[128] See note 17 above.

[129] 'The third difference between the Hague and the Geneva approaches, and which derives from the second one, relates to the structure of the occupant's duties and powers. The occupant must be a proactive regulator, no longer the disinterested watch guard envisioned in the Hague Regulations.' Benvenisti (*supra* note 116), 74.

[130] See Chapter 6 'Civilising Iraq: the neoliberal reconstruction of Iraq and the role of international law'of the thesis at hand.

5:3:2 International territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor

As was argued above, since the 1990s the practice of international organisations, especially that of the UN, has transitioned from traditional peacekeeping designed to minimise international conflict, to peacebuilding, a proactive process of altering the social economic and political foundations of a state by linking these reforms with peace. Such was the transformation of the approach of the UN to post-conflict societies that an official of the organisation wrote in 2004 that classic peacekeeping 'has taken on a somewhat fossil-like appearance',[131] while UN mandates broadened significantly to include a series of administrative duties that, in the cases of Eastern Slavonia, Kosovo and East Timor, reached the level of full governing authority. Due to the emergence of the concept of 'peacebuilding' and due to the actual experiences of peacebuilding during the 1990s and early 2000s, the idea that economic neoliberalisation is essential for the establishment of peace was legitimised within the international community. This led scholars otherwise sympathetic to the idea of the globalisation of the (neo)liberal market economy, such as Roland Paris, to argue that there is a 'liberal bias' in international peacekeeping that echoes the nineteenth-century civilising mission.[132] It is telling that, in virtually all peacebuilding instances after 1990, the UN actively co-operated with the World Bank and the IMF, a choice that indicates the willingness of the organisation to restructure these societies in conformity with the neoliberal paradigm promoted by the Bretton Woods institutions.[133]

A good first example to establish this trend of radical neoliberal reform in the context of ITA is that of Bosnia and Herzegovina (BiH). After 44 months of devastating civil war, the Dayton Peace Accords were signed by Croatia, BiH and the Federal Republic of Yugoslavia, establishing a complex system of international tutelage.[134] Various organisations were involved in the ITA of BiH, including the UN, the EU, NATO, the Organization for Security and Co-operation in Europe, and the Bretton Woods Institutions. Among these the High Representative, an official appointed by the UN Security Council through a complex process involving multiple actors, along with the secretariat (collectively known as the Office of the High Representative [OHR]) gradually asserted the right to perform important administrative actions in the country.[135]

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[131] E. Mortimer, 'International Administration of War-Torn Societies' (2004) 10 Global Governance 7, 8.

[132] 'Although modern peacebuilders have largely abandoned the archaic language of civilised versus uncivilised, they nevertheless appear to act upon the belief that one model of domestic governance - liberal market democracy - is superior to all others.' R. Paris, 'International Peacebuilding and the "Mission Civilisatrice"' (2002) 28 Review of International Studies 637, 638.

[133] Ibid., 639-40.

[134] Wilde refers to the complexity of the system established by Dayton as 'unusual and, to outsiders, largely mysterious'. Wilde (*supra* note 93), 70.

[135] Ibid., 64.

As Pugh observed, ITA in BiH involved the framing of the post-conflict socialist economy 'as the dysfunctional "other"',[136] and oscillated between 'nation building and diminishing the state as an economic actor by privatizing essential services and shifting responsibility for employment from the state to the individual'.[137] In this context, the Constitution of BiH, which is incorporated in the Dayton Agreement, elevates the construction of a free market to one of its primary purposes, linking it further to the rejection of violence and the establishment of peace.[138] The conviction that free markets would automatically bring peace and stability was so prevalent that the 'international community' praised repeatedly the *Arizona Market*, a marketplace in the city of Brčko that sprang up to cover the everyday needs of the local population: '[f]rom the beginning, the international refrain was that while the rest of Bosnia was mired in ethnic hatred, men (not women) of different ethnic groups happily interacted in Arizona Market with business as their neutral ground'.[139] To build this 'market-driven peace' narrative, though, the 'international community' had to ignore the fact that women and children were systematically sold and bought at Arizona Market for forced prostitution and slave labour:

> While human rights and the rule of law were discussed and planned for in other parts of Bosnia, they were blatantly violated in Arizona Market with the full acquiescence of the IC, which insisted that the market represented the highest expression of free market ideals. Eventually it was publicly acknowledged that women and girls were being trafficked through Arizona Market.[140]

As in the case of Kosovo that will be discussed below, the greatest obstacle to this transition to a free-market economy were the socially-owned enterprises (SOEs) that previously dominated the economy of Yugoslavia. Yugoslavia had a highly idiosyncratic system of market socialism and, therefore, productive enterprises did not belong to the state, but to society as a whole and were run by their employees.[141] The Bretton Woods Institutions and USAID advocated for the rapid privatisation of the SOEs, mobilising arguments ranging from the inherent inefficiency of non-privately owned

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[136] M. Pugh, 'Postwar Political Economy in Bosnia and Herzegovina: The Spoils of Peace' (2002) 8 Global Governance 467, 468.

[137] Ibid.

[138] 'Rejecting the violence of war; Wishing to contribute to peace promotion; Desiring to support individual liberty and to develop *a free market*' Annex 4 Constitution Preamble *Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina* (21 November 1995), available at: http://www.refworld.org/docid/3de495c34.html (Last accessed: 13/01/2016).

[139] D. F. Haynes, 'Lessons from Bosnia's Arizona Market: Harm to Women in Neoliberalized Postconflict Reconstruction Process' (2010) 158 University of Pennsylvania Law Review 1779, 1785.

[140] Ibid., 1789.

[141] For a comprehensive analysis of the legal aspects of Yugoslavia's socialist legal system and of the legal aspects of UNMIK's privatisation plans, see: M. Grasten and L. J. Uberti, 'The Politics of Law in a Post-conflict UN Protectorate: Privatisation and Property Rights in Kosovo (1999–2008)' (2015) Journal of International Relations and Development 1.

businesses[142] to the need to combat corruption and political influence, which were seen as synonymous to public management.[143] Moreover, the IMF argued that privatisation would have a positive impact on employment and export-led growth, which allegedly would also be evident within three years.[144] Apart from privatisations, a commitment to neoliberalism was also evident in the design of macro-economic policies. As Wilde points out, all non-elected positions were staffed by international appointees.[145] More specifically, the Governor of the Central Bank was appointed directly by the IMF,[146] which meant that the monetary policy of BiH was completely controlled by the IMF and subjected to its monetarist doctrines.[147]

Further, the internationalised rule of BiH nominally intended to establish a liberal, pluralistic democracy,[148] while it displayed disregard or even open hostility towards local political actors. For example, it was common to blame the Bosnians (and other peoples of the former Eastern Bloc) as being uncooperative whenever an initiative, such as rapid privatisation, failed:

> [p]rivatization in transition economies could have and should have been better managed; opportunities were missed. However, holding privatization accountable for all the problems of transition is inaccurate, and unfair. Change of ownership was by itself insufficient to cut political-financial links between firms and the state, but that was not clear at the outset, and still appears to be a necessary, if not a sufficient, condition for successful reform.[149]

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[142] 'Managers and workers had few incentives to preserve capital or to ensure healthy profits. On the contrary, inefficient enterprises continued to benefit from government subsidies, guarantees and risky bank credits, thereby preventing new enterprises from entering the market or from expanding.' World Bank, 'Implementation, Completion and Results Report on a Credit in the Amount of SDR 15.60 Million (US$19.80 Million Equivalent) to Bosnia and Herzegovina for a Privatization Technical Assistance Credit' (21 March 2007), 7.

[143] 'Efficient enterprises often failed to serve as engines of growth because political parties or public agencies intervened directly in their business activities.' Ibid.

[144] 'These are grounds to state that the newly privatized companies will continue to operate successfully and have a positive effect on the overall economic development of the country. The experience of other transition countries was that it took roughly three years for the effects of reforms to start being felt.' International Monetary Fund 'Bosnia and Herzegovina: Poverty Reduction Strategy Paper—Mid-Term Development Strategy' (April 2004), 66.

[145] Wilde (*supra* note 131), 70.

[146] *Dayton Peace Agreement* (*supra* note 138) Annex 4 Article VII.

[147] For a comprehensive critique of IMF's monetarism, see: J. E. Stiglitz, *Globalization and its Discontents* (Penguin, 2003).

[148] 'In both Bosnia and Herzegovina generally, and Mostar and Brčko in particular, the use of ITA has been understood, in part, as an attempt to promote a multi-ethnic social and political culture.' Wilde (*supra* note 131), 219.

[149] J. Nellis, 'The World Bank Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis' Transition Newsletter (January-February 2002), 17.

Moreover, the OHR assumed a proactive role that amounted to defying the will of local representatives and even removing them from office.[150] As Wilde convincingly argues, such decisions ran counter to the narrative that it was the absence of local governing structures that necessitated the establishment of ITA and indicated how the OHR passed substantive judgments on the agenda and qualifications of local representatives.[151] It is also indicative of the limited perception of democracy promoted in BiH that a number of crucial appointments, such as that of the Commission on Public Corporations, was conducted by international actors (in this case the President of the European Bank for Reconstruction and Development), without even a formal requirement to consult local actors.[152] As the case of BiH indicates, the rhetoric of democracy casually co-existed symbiotically with anti-democratic practices and assumptions against genuine local participation in ITA.

The reconstruction of BiH was the blueprint for the ITA experiment in Kosovo.[153] Established by UNSC Resolution 1244,[154] which followed NATO's bombing campaign, UNMIK (United Nations Mission in Kosovo) assumed full legislative, executive and judicial authority over Kosovo,[155] while sovereignty nominally rested with the Federal Republic of Yugoslavia (FRY).[156] UNMIK worked closely with the EU Commission and the World Bank in planning and executing the reconstruction of Kosovo along neoliberal lines. The vision of the three organisations was summarised in a policy document entitled *Toward Stability and Prosperity: A Program for Reconstruction and Recovery in Kosovo*, where transition to a free-market economy is presented as a neutral, inevitable process that will also quasi-automatically resolve Kosovo's pressing social problems: '[t]o develop a thriving, open and transparent market economy, which can quickly provide jobs to a large part of the Kosovar population; this will require restarting the rural economy, encouraging the development of the private

[150] OHR 'Decision Removing from Mr Nikola Poplasen from the Office of the President of Republika Srpska' (5 March 1999) Available at: http://www.ohr.int/?p=55123&print=pdf (Last Accessed: 11/01/2016).

[151] Wilde (*supra* note 93), 16.

[152] Ibid., 71.

[153] J. S. Sørensen, *State Collapse and Reconstruction in the Periphery: Political Economy, Ethnicity and Development in Yugoslavia, Serbia and Kosovo* (Berghahn Books, 2009), 30.

[154] UNSC Resolution 1244 (*supra* note 120).

[155] 'Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.' Ibid., para. 10.

[156] 'Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2.' Ibid.

sector, and addressing the issues of public enterprises'.[157] In a stark parallel with BiH,[158] the principal obstacles for the realisation of this vision were Kosovo's socially-owned enterprises (SOEs). Confronted with the peculiarity of the property rights in Kosovo and with own internal tensions,[159] UNMIK opted for instituting a system of tradable leasing so that commercial transactions would not violate formal property rights, whenever clarified.[160] This measure enabled the commercialisation of Kosovo's public property, while protecting UNMIK from lawsuits from potential right-holders. It is telling that, commenting on the process of dismantling Kosovo's SOEs, de Brabandere argued that '[t]he majority of state-owned enterprises and socially-owned enterprises were as such not viable in a market economy'.[161] This assessment echoed directly the public pronouncement of the Special Representative of United Nations Secretary General Michael Steiner: '[w]e need to face reality and call a spade a spade. Most of Kosovo's socially owned enterprises are dinosaurs. Even if we had the capital needed to rebuild them - and we don't have it - we could not make viable enterprises out of them. It is time to acknowledge that the old economic approach has failed.'[162] Both theorists and practitioners confidently pronounced the unsuitability of SOEs for a free-market economy. Whether and why Kosovo should become a neoliberal free-market economy was not even up for discussion. In fact, the 2008 Constitution of Kosovo included a provision (Article 159) that *mandated* the privatisation of the SOEs: 'All enterprises that were wholly or partly in social ownership prior to the effective date of this Constitution shall be privatized in accordance with law.'[163]

This is not an exhaustive list of the neoliberal reforms of UNMIK. Nonetheless, the case of SOEs is instructive, since it shows that the stance of UNMIK was a typical example of neoliberal perceptions

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[157] 'Toward Stability and Prosperity: A Program for Reconstruction and Recovery in Kosovo', Prepared by the European Commission and the World Bank in Support of the United Nations Mission in Kosovo (3 November 1999), para. 4.

[158] See note 38 above.

[159] Grasten and Uberti argue that within UNMIK there were two different and largely contradictory understandings of property rights; one that emphasised policy and one that saw rights as side-constraints to governmental action. Grasten and Uberti (*supra* note 141), 10.

[160] UNMIK Regulation No. 2003/13 'On the Transformation of the Right to Use Socially-Owned Immovable Property' (09 May 2003) UNMIK/REG/2003/13.

[161] de Brabandere (*supra* note 91), 150-151.

[162] UNMIK Press Release, 'SRSG Michael Steiner Addresses University of Pristina on Privatization' UN Doc. UNMIK/PR18 (18 April 2002).

[163] Constitution of the Republic of Kosovo (15 June 2008), Article 159, para. 1. The Constitution, further, expressly allowed for the privatisation of publicly-owned enterprises: 'The Republic of Kosovo shall own all enterprises in the Republic of Kosovo that are Publicly Owned Enterprises. All obligations related to such ownership rights shall be the obligations of the Republic of Kosovo. The Government of Kosovo may privatize, concession or lease a Publicly Owned Enterprise as provided by law.' Ibid., Article 160, para. 1.

of publicly owned enterprises. UNMIK considered assets that were not privately owned – be they socially- or state-owned – a *prima facie* problem and did not envisage any role for them in the society they were building. A few years later, the occupying powers of Iraq (the Coalition Provisional Authority [CPA]) closely followed this approach.[164] Further, UNMIK adhered to a narrow, formalistic and diminished concept of democracy, as the CPA also did in Iraq after 2003.[165] For example, it is worth noting that, despite the rhetorical centrality of humanitarian concerns in Resolution 1244,[166] during the first months of UNMIK's presence in the region, between 65,000 and 250,000 individuals belonging to ethnic minorities were displaced and more than 1,000 killed.[167] The inability or even outright unwillingness of NATO's troops to intervene while Serbs, Roma and other minorities were persecuted calls into question not only the motives of the intervention, but also their understanding of democracy in Kosovo. Hence, the 2004 open outbreak of ethnic violence, which ended up undermining the very authority of UNMIK, cannot be seen as a mere accident.[168] Further, faithful to the commitment to formal elements of democracy, UNMIK had already pushed for elections since October 2000, even though there were grave technical problems (*inter alia*, the absence of updated catalogues, no registration forms in Turkish, even though it was recognised as a minority language by the FRY),[169] which undermined the credibility of the process. Hence, it is unsurprising that participation rates steadily declined.[170] Disenfranchisement was particularly prevalent among the Serb population, which, from a certain point onwards, boycotted the process altogether.[171] Here, the process of democratisation was reduced to a series of formal processes and rights, while ethnic violence was systematically tolerated and the people of Kosovo were deprived of their previously

[164] See Chapter 6 of the present thesis.

[165] Ibid.

[166] 'Determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes; Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party; Recalling the statement made by the Secretary-General on 9 April 1999, expressing concern at the humanitarian tragedy taking place in Kosovo; Reaffirming the right of all refugees and displaced persons to return to their homes in safety.' Preamble UNSC Res 1244 (note 181).

[167] 'The majority of IDPs in Serbia today are ethnic Serbs (75%) and RAE (10%) who fled Kosovo in 1999 after the United Nations assumed responsibility for the Province under the mandate of the United Nations Interim Mission in Kosovo (UNMIK). […] Today, seven years after the conflict in Kosovo ended, the number of IDPs from Kosovo in Serbia still remains high: 206,879 persons.' UN High Commissioner for Refugees, 'Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice' (March 2007), available at: http://www.refworld.org/docid/4704bff72.html [accessed 31 December 2015].

[168] Sørensen (*supra* note 153), 221.

[169] Ibid., 224.

[170] Ibid.

[171] Ibid., 233.

communally-held assets. Finally, the neoliberal character of Kosovo's economy was enshrined in its Constitution: '[a] market economy with free competition is the basis of the economic order of the Republic of Kosovo'.[172] Radically diminishing the democratic options of the people of Kosovo and 'locking in' a very particular form of social organisation, the Constitution of Kosovo reveals a vision of democracy directly influenced by the Hayekian conviction that democratic process should always be subordinated to neoliberal imperatives.[173]

A third example of this subordination is East Timor, now officially renamed Timor-Leste. Following years of Portuguese colonialism and Indonesian aggression, East Timor decided in a referendum to become independent. The results of the process were followed by widespread violence by Indonesian militias that in turn gave rise to a UN intervention. UN Security Council Resolution 1272 established the UN Transitional Administration for East Timor (UNTAET) and conferred to it 'overall responsibility for the administration of East Timor' and authorised it 'to exercise all legislative and executive authority, including the administration of justice'[174] until the country achieved formal independence. It is therefore clear that the authority of the UN was akin to that of a sovereign power. Yet, the UN exercised this authority without due regard to local actors invoking the factually tenuous argument that there were no local actors to work with.[175] Therefore, 'the mission was a purely UN operation, with no recognized local counterpart. It had an internationally recruited civil administration, staffed by people with no expertise of the country or knowledge of locally understood languages.'[176] Thus, Richmond and Franks have contended that '[t]he UN's centralized approach was reminiscent of colonial administrations in its reluctance to share power',[177] a choice that arguably damaged the development of democracy in East Timor.[178] The parallels with the attitude of the High

[172] Constitution of the Republic of Kosovo (15 June 2008), Article 10. A free market economy was also enumerated as one of the core values of Kosovo: 'The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.' Ibid., Article 7.

[173] See note 66 above.

[174] UNSC Res 1272 (25 October 1999) S/RES/1272.

[175] In practice, CNRT (National Congress for Timorese Reconstruction) controlled significant parts of East Timor and, due to its participation to the liberation struggles, was both well-organised and enjoyed legitimacy. See: J. Chopra, 'The UN's Kingdom of East Timor' (2000) 42 Survival 27, 32.

[176] A. Suhrke, 'Peacekeepers as Nation-Builders: Dilemmas of the UN in East Timor' (2001) 8 International Peacekeeping 1, 11.

[177] O. P. Richmond and J. Franks, 'Liberal Peacebuilding in Timor Leste: The Emperor's New Clothes?' (2008) 15 International Peacekeeping 185, 190.

[178] 'This generated mistrust and particularly affected capacity-building attempts, especially in governance and the civil service. The dilemma was that in order for locals to build capacity they needed the time to be included

Representative in BiH[179] are too stark to miss, establishing a distinctive pattern of authoritarianism endemic to ITA experiments. Disregard of the communities' opinions was linked to the inherently orientalist character of ITA projects,[180] that are more or less explicitly based on the presumption that local actors are not mature enough to resolve their conflicts. After all, Wilde has cogently argued that the international administration of East Timor was envisaged before the referendum and the violent outbreaks, but rather 'it concerned the perceived inability of the East Timorese, in the short term, to govern themselves once Indonesia withdrew'.[181]

Moreover, a degree of authoritarianism and detachment from local societies was necessary for the promotion of neoliberal reforms promoted by ITA systematically, since they tended to be destructive and unpopular with local communities. The case of agricultural reform will be illustrative of this approach, since it shows how authoritarian neoliberal reform became the norm of post-conflict governance. In East Timor, the absolute control of UNTAET over the country, and the fact that economic governance was mainly conducted by the World Bank,[182] meant that the organisation was able to reform East Timorese agriculture according to its will. Hence, the World Bank encouraged export-oriented agriculture, implementing its conviction that agriculture should be predominately a commercialised activity incorporated to global value chains and rejecting proposals for self-sufficiency.[183] Correspondingly, it discouraged the protection of rice production,[184] which constitutes

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(and trusted) by internationals to perform the roles and tasks, and, if necessary, to make mistakes from which to learn.' Ibid.

[179] See note 147 above.

[180] Even though good manners and political restraints did not allow for an explicit reproduction of orientalist stereotypes, the justifications for the disregard of local actors echoed the perception of the 'Orientals' by colonialists: 'Orientals are inveterate liars, they are "lethargic and suspicious", and in everything oppose the clarity, directness, and nobility of the Anglo-Saxon race.' E. W. Said, *Orientalism* (Vintage Books, 1978), 78.

[181] R. Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 European Journal of International Law 71, 84.

[182] 'UNTAET was ill-equipped for peacebuilding because it was structured as a peacekeeping operation. Indeed, the World Bank latterly undertook this role.' Richmond and Franks (*supra* note 175), citing an interview with Telibert Laoc, National Democratic Institute Country Director, Dili, 28 Sept. 2006.

[183] Although there has been discussion within East Timor and its donors of a policy that would ensure self-sufficiency in food production, other countries have found this approach to be expensive and difficult to sustain. It is expensive because to guarantee sufficient local supplies in a low production year, stocks must be purchased and held from above average production years. World Bank, 'Updates No 1-8: Trust Fund for East Timor' (2000-2001), para 4.47.

[184] The Bank rejected the proposal for a temporarily higher tariff on rice imports, which would have assisted local production to recover after years of conflict: 'This in turn could promote shifts in cropping patterns not necessarily beneficial or sustainable in the long term. These factors suggest that a hasty decision on higher

the basis of the East Timorese diet, a choice that exposed the population to significant risks regarding their food security:

> The global food crisis of 2008 was the culmination of a double movement in price volatility, which had been brewing for some years. Timor was already in the grip of yet another of its own food crises, following the political violence of 2006; the global food crisis compounded this. In the first phase, cheap subsidised grain imports killed local developing country markets. In the second phase, expensive grain imports starved whole populations. Until the recent crisis, small farmers had been hurt by cheap imports.[185]

Further, along with Australia (a state heavily involved with ITA in East Timor), it prioritised the privatisation of agriculture, since

> [t]he alternative of having the public sector heavily involved in the provision of research, extension and input supply services was examined and discarded because: (i) such public sector involvement has not proven successful elsewhere; and (ii) the anticipated government fiscal resources would not be able to afford such a burden. That is the reason why the proposed PASCs are designed to be privately owned, commercially-operated and self-sustaining enterprises.[186]

Similarly, the World Bank rejected the proposal to create a public abattoir and a public grain silo, even though it was supported by the East Timorese and even by parts of the UNTATET. Interestingly, the World Bank was happy to acknowledge the unpopularity of its decision, but insisted since public access to grain would undermine its plan to commercialise and privatise agriculture fully.[187]

Conclusion

Chimni has argued that the universality of international organisations such as the UN is a significant legitimisation force for the neoliberal paradigm since it can 'offer an "intellectual and moral unity" to

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protection should be avoided, and any such decision should be preceded by developing feasible means to assist the poorest rice consumers, particularly in the uplands, who are currently benefiting from the greater availability of imported rice.' Ibid., para 4.33.

[185] T. Anderson '"Land reform" in Timor Leste? Why the Constitution is worth defending' M. Leach, N. Canas Mendes, A. B. da Silva, A. da Costa Ximenes and B. Boughton (eds), *Understanding Timor-Leste: Proceedings of the Understanding Timor-Leste Conference* (Universidade Nacional Timor-Lorosa'e, Dili, Timor-Leste, 2-3 July 2009), 215.

[186] World Bank 'Project Appraisal Document on a Proposed Trust Fund for East Timor Grant in the Amount of US$6.8 Million Equivalent and a Second Grant of US$11.4 Million to East Timor for an Agriculture Rehabilitation Project' (14 June 2000) Report No: 2043 9-TP.

[187] 'To ensure a realistic project design and implementation program the Project did not finance certain activities proposed by UNTAET and East Timorese counterparts. These include the construction of slaughterhouses, the provision of central grain silos, etc. Some members of UNTAET and East Timorese counterparts may not appreciate the lack of public sector command and control structures and activities and may not support the Project.' Ibid.

a particular vision of the world order in the matrix of which their mandate and functions acquire meaning'.[188] This observation is particularly pertinent in the context of increased (neo)liberal interventionism and post-conflict social transformation after the 1990s. This chapter showed that the neoliberal model of statehood was standardised, legitimised and (almost) universalised through the practice of UN-led ITA after the end of the Cold War. In this sense, the role of international law in the global diffusion of capitalist relations of production was both maintained and altered. It was maintained to the extent that neoliberalism constitutes the hegemonic form of capitalist accumulation of our times. It was also altered, as was shown in this chapter, because neoliberalism represents a distinctive, novel capitalist rationality, and it is not simply a repetition of nineteenth-century liberalism. In this sense, my narrative is one of rupture as much as it is one of continuity. In fact, it was in this moment of transition to a distinctively neoliberal international legality that the 2003 invasion of Iraq took place. Signalling a moment of profound crisis for the discipline, but also for international relations as a whole, and given its significant and enduring consequences, the invasion, occupation and transformation of Iraq will be the subject of the final chapter of this thesis

[188] Chimni (*supra* note 84), 23.

Chapter 6: Back to Iraq: neoliberal reform and the role of international law in the 21st century

First time as tragedy, second time as farce.

Karl Marx, The Eighteenth Brumaire of Louis Bonaparte

Writing about the independence of Iraq under the supervision of the Permanent Mandates Commission of the League of Nations, Pedersen entitled her article 'Getting out of Iraq - in 1932'.[1] Written in 2010, the irony of the title is evident: Pedersen was indirectly referring to the subsequent adventures of the UK (and the US) in Iraq and their apparent difficulty to 'get out of' the Middle Eastern state. Without subscribing to any 'circular' understanding of history, this thesis will conclude with an analysis of the events that followed the invasion of Iraq in 2003 and the role of international law. More specifically, I will examine the neoliberal reconstruction of Iraq in the aftermath of the invasion. In doing so, I will also attempt to link this example to the wider argument in this thesis, namely, the central importance of international law in the promotion and consolidation of capitalist relations of production.

Arguably, there are numerous examples that establish the intrinsic links between neoliberalism and international law and institutions, ranging from international trade and investment, to structural adjustment in the Global South, and recently in the South of the European Union.[2] Still, the choice of Iraq as a case study of the continuing synergies between international law and capitalism is dictated by three distinct, but interrelated reasons. First, this thesis rests upon the presumption that, even though international law has undergone significant changes since the nineteenth century, some of its core social functions remain the same. The argument of this thesis is that the diffusion and consolidation of capitalist relations of production is one of these functions. Given this claim to functional continuity, it is worth revisiting Iraq, in light its centrality during the Mandate era.[3] The second reason is linked to the reform process that followed the invasion as such. The reforms implemented since 2003 constitute the most rapid and complete process of neoliberal social engineering thus far, and, importantly, it was also seen as such by the occupying powers and the UN. Therefore, Iraq constitutes the most archetypical example of neoliberalism in motion, and would

[1] S. Pedersen, 'Getting out of Iraq - in 1932: The League of Nations and the Road to Normative Statehood' (2010) 115 The American Historical Review 975.

[2] A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World', (2000) 32 New York University Journal of International Law and Politics', 243; I. Katsaroumpas, 'EU bailout Conditionality as a de facto Mode of Government' (2013) 96 Critical Quarterly for Legislation and Law 345.

[3] See generally Section 3:1 'From "civilised" to "emancipated": conditions for statehood under the Mandates System and the persistence of "civilisation"' of the thesis at hand.

allow me to verify some of the claims advanced in the previous chapter.[4] Finally, this choice is motivated by a desire to participate in the intra-disciplinary debate of international lawyers about the role of international law in a troubled world.

Undeniably, 2003 was a moment of disciplinary crisis for international lawyers. After a rare moment of unity in the characterisation of the war as illegal,[5] an intense period of self-reflection was initiated.[6] Perhaps unsurprisingly, many international lawyers chose to turn this crisis into an opportunity for salvation of the discipline. The general feeling was that if international law were more effective, and if the great powers respected it, the tragedy of Iraq would have been avoided. Charlesworth was not alone in her assessment when she concluded that:

> I think that the war of Iraq, with its aftermath, has shaken the foundations of international law, but at the same time it underlined the real value of the international legal system. [International law] offers a set of standards against which we can measure international behaviour and call governments to account.[7]

The purpose of this chapter is to argue that, even though this may well be true when it comes to international law regulating the use of force, the situation is much more complicated when it comes to the events that followed the invasion. Therefore, one of the reasons dictating this choice of case study is the need to highlight the complicity of international legal structures with the radical neoliberal reforms in Iraq and, by implication, with the catastrophic events that followed. To recall Miéville, my argument here is that the chaos unfolding in the Middle East is not primarily the result of a 'lawless world';[8] rather, it is an outcome of the rule of international law.[9]

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[4] See: Chapter 5 'International territorial administration: international law and capitalism in a post-colonial world' of this thesis.

[5] 'War Would Be Illegal' *The Guardian* (London, 7 March 2003).

[6] To mention but a few examples, the American Journal of International Law organised an *agora* on the Iraq War and international law, hosting thirteen articles in its summer and autumn issues of Volume 97 (2003). For the subsequent thoughts of four of the signatories to the open letter to the *Guardian* see: M. Craven, S. Marks, G. Simpson, R. Wilde, '"We Are Teachers of International Law'" (2004) 17 Leiden Journal of International Law 363.

[7] H. Charlesworth, 'What's Law Got to Do with the War?' in R. Gaita, *Why the War Was Wrong* (The Text Publishing Company, 2003), 57; 'It is not the Charter system that is in disarray, providing sensible grounds for declaring the project of regulating recourse to war by states a failed experiment that should now be abandoned. It is rather leading states, and above all the United States, that need to be persuaded that their interests are served and their values realized by a more diligent pursuit of a law-oriented foreign policy.' R.A. Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97 American Journal of International Law 590, 598.

[8] The phrase is borrowed from Sands' homonymous book, which also heavily criticised the 2003 invasion and defended international law: P. Sands, *Lawless World: Making and Breaking Global Rules* (Penguin, 2006).

To do so, this chapter will proceed as follows: in the first section, a sketch of the legal architecture of the occupation will be provided. My analysis will focus on UNSC Resolution 1483,[10] which recognised the fact of the occupation. My main point of analysis will be whether and to what extent the resolution authorised a 'transformative' occupation that was compatible with the sweeping reforms of the Coalition Provisional Authority (CPA). Subsequently, an account of these sweeping reforms of Iraq's economic, political and social system will be provided. The argument put forward is that the establishment of an independent central bank, the process of outsourcing and shrinking public functions, the imposition of a flat tax and the unprecedented liberalisation of investment law constitute one of the most intense and rapid processes of establishment of a neoliberal model of government. Secondly, this part of my analysis focuses on the concept of 'low intensity democracy' as the model put forward for the political reconstruction of Iraq. My broader argument is that, as the indeterminacy of both the laws of occupation and the said Resolution, the ideological climate of the time is crucial when interpreting these legal materials. Given that democratic peace theory appeared to have strong ideological appeal in its links between peace, democracy and a certain version of the free market economy, the argument that the neoliberal reforms were patently illegal is unjustified. Returning to my earlier argument about the neoliberal social engineering in Bosnia and Herzegovina, East Timor, and Kosovo,[11] each of which were carried out by international organisations such as the UN, it will be argued that international law and organisations had assumed a central role in the gradual erosion of sovereignty and self-determination to the benefit of neoliberal social transformation. In an indirect, implicit revival of the 'standard of civilisation', experiments in ITA gradually redefined the 'acceptable' model of statehood in international law. Even though sovereignty remained nominally at the core of the discipline, neoliberal statehood was indirectly elevated into the sole international legal paradigm of political organisation. This transformative exercise never reached the clarity and rigidity of the nineteenth-century standard of civilisation. However, it is argued that Iraq occurred in the middle of a process of radical transformation of international law and institutions in accordance with neoliberal imperatives, and therefore, it must be understood as part of this broader process.

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[9] 'A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*.' C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006), 319 (*emphasis as in the original*).

[10] UNSC Res 1483 (22 May 2003) S/RES/1483 (2003).

[11] See Section 5:3:2 'International territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the thesis at hand.

6:1 Resolution 1483 and its legal implications: the laws of occupation and neoliberal legality

On the 20th of March 2003, the US, the UK and their Coalition partners launched a military attack against Iraq, and quickly overthrew the government of Saddam Hussein. They did so after they had failed to secure a UN Security Council resolution that would authorise the use of force under Chapter VII of the UN Charter. After this failure, the US and the UK attempted to justify their actions under international law with a complicated argument involving a combination of UNSC Resolutions 678, 687 and 1444 and the assertion that Iraq was allegedly in a 'material breach' of disarmament obligations of the cease-fire regime established by Resolution 687. In turn, the US and the UK argued that this 'material breach' somehow revived Resolution 678 (1991), which had authorised the use of force against Iraq after its invasion of Kuwait.[12] The US also invoked the right to self-defence under Article 51 of the UN Charter.[13] As was mentioned already, these arguments were largely rejected, and the UN Secretary-General publicly stated that the use of force was unlawful under international law.[14] However, these intense debates about the (il)legality of use of force were pragmatically side-lined by new conditions on the ground. On the 8th of May, the US, the UK and the Coalition partners jointly addressed a letter to the UNSC. Even though the letter stopped short of describing the role of the Coalition as one of occupying powers, it contained clear references to the laws of occupation: '[t]he States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.'[15] Furthermore, the involved states referred to their intention to secure a 'representative government' for Iraq, while they also signalled their willingness to allow for some (limited) involvement of the UN in the administration of Iraq: '[t]he United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim

[12] For the UK's argument, see: C. Warbrick and D. McGoldrick, 'The Use of Force Against Iraq' (2003) 52 International and Comparative Law Quarterly 811. For a good summary of the US position, see: W. H. Taft and T. F. Buchwald, 'Preemption, Iraq, and International Law' (2003) 97 American Journal of International Law 557.

[13] In an interview with the BBC at the time, Kofi Annan, when pressed, stated that: 'I have indicated it was not in conformity with the UN Charter from our point of view, from the Charter point of view, it was illegal.' 'Iraq war illegal, says Annan', BBC News 16 September 2004, available at: http://news.bbc.co.uk/1/hi/world/middle_east/ 3661134.stm [last accessed 25 June 2016].

[14] UN Security Council, 'Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council' 8 May 2003 S/2003/538, 1.

[15] Ibid., 2.

authority'.[16] Along with the letter, the US and the UK also initiated the process to secure a Security Council resolution that would legitimise their presence in Iraq and, presumably, would facilitate and/or legalise the radical neoliberal reforms that they were planning to implement. Even though the details of the negotiation process have not been publicised, it is clear that their product, Resolution 1483,[17] was the outcome of intense bargaining and compromise, and needs to be approached as such. The representative of the Russian Federation publicly acknowledged that the Resolution was 'a major compromise' that 'did not provide final answers to all questions related to Iraq'.[18]

Even though the Resolution did not provide an exhaustive legal regulation for the occupation of Iraq, it attempted to set a fairly comprehensive framework. To do so, it expressly characterised the US and the UK as 'occupying powers under unified command', and referred to their specific authorities, responsibilities and obligations under the applicable international law. Indeed, the usage of the word 'occupation' was of paramount importance, given that the UN had studiously avoided using the term when referring to instances of international territorial administration (ITA) in Bosnia, Kosovo or East Timor.[19] Further, Resolution 1483 specifically called upon 'all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907'.[20] Arguably, this included the 'conservationist principle', as mapped in Chapter 5 of the present thesis.[21] More specifically, the 'conservationist principle' derives from the obligations of the occupier to respect the laws in force in the country, unless absolutely prevented from doing so in accordance with Article 43 of the Hague Regulations,[22] and to allow local (penal)

[16] Ibid.

[17] Resolution 1483 (*supra* note 10).

[18] Security Council, Press Release: 'Security Council Lifts Sanctions on Iraq, Approves UN Role, Calls for Appointment of Secretary-Genera's Special Representative' 22 May 2002 SC 77/65, available at: http://www.un.org/press/en/2003/sc7765.doc.htm [last accessed 25 June 2016].

[19] 'For the first time in its decade-old history of peace enforcement and restructuring efforts, the UN resorts to the concept of occupation.' E. Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective' (2003) 1 IDF Law Review 19, 36. Benvenisti took his analysis several steps further, arguing that the invocation of the concept restored 'occupation' to its original, neutral meaning. Indeed, he concluded his article with the following statement: 'Besides the obvious potential benefits to the Iraqi people, a satisfactory implementation of the Resolution will help relieve the doctrine on "occupation" of its derogatory connotation.' Ibid., 38.

[20] Resolution 1483 (*supra* note 10), Preamble.

[21] See Section 5:3:1 'After the "end of history": international territorial administration in the years of triumphant neoliberalism' of this thesis.

[22] Article 43 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907).

laws to remain in force, unless 'they constitute a threat to its security or an obstacle to the application of the present Convention'.[23]

Even though this legal framework appears prohibitive of profound reforms such as those undertaken by the CPA, the rest of the Resolution creates a much more complicated picture. In various parts, the Resolution contained references to the 'creation of conditions in which the Iraqi people can freely determine their own political future',[24] the 'efforts to *restore and establish* national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq',[25] and encouragement of 'international efforts to promote legal and judicial reform'.[26] Given that, prior to the invasion, Iraq was governed by a dictatorial regime, it is difficult to see how the above-mentioned reforms towards representative government could take place in conformity with the 'conservationist principle'. Moreover, when enumerating the responsibilities of the Special Representative of the Secretary-General, who acted as the main locus of the UN's engagement with Iraq, Resolution 1483 made extensive references to the economic reconstruction of Iraq: 'promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions'.[27] Once again, it is difficult to reconcile these functions with a strict approach to the 'conservationist principle'. Still, it has been argued that the specific functions are only mentioned in relation to the Special Representative, and not the CPA.[28] Even though this is technically correct, it ignores that, in the overall architecture of Resolution 1483, the role of the UN was a complementary and supervisory one. Paragraph 8 of Resolution 1483 reads as follows:

> Requests the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among

[23] Article 64 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 6 UST 3516, 75 UNTS 287 (hereinafter GCIV).

[24] Resolution 1483 (*supra* note 10), Paragraph 4.

[25] Ibid., Paragraph 8 (emphasis added).

[26] Ibid.

[27] Ibid.

[28] 'Second, and more specifically, the resolution's list of reformist tasks was directed not to the CPA but to the Special Representative of the Secretary-General. The distinction is not merely semantic. Many Council members opposed to the war were prepared to authorize the United Nations to perform tasks they would not explicitly delegate to the CPA.' G. H. Fox, 'The Occupation of Iraq' (2004) 36 Georgetown Journal of International Law 195, 261.

> United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq.[29]

Therefore, such responsibilities of the Special Representative cannot be wholly uncoupled from the permitted functions of the CPA itself. On a related note, it is important to point out that Resolution 1483 follows the standard practice of UN-led ITA[30] and engaged the international financial institutions in the reconstruction of Iraq.[31] I have earlier argued that, given the consistent practice of the IFIs at least since the 1980s to implement highly intrusive, neoliberal policies both in the context of ITA,[32] and more broadly,[33] the choice to implicate them in the reconstruction of Iraq is not compatible with a strict reading of the laws of occupation. As Koskenniemi once pointed out, 'once one knows which institution will deal with an issue, one already knows how it will be disposed of'.[34] In 2003, the choice of engaging the IMF and the World Bank in the reconstruction of Iraq does not support a restrictive interpretation of Resolution 1483, but rather hints at a far-reaching neoliberal project of reconstruction.

A strict reading of the resolution would also be incompatible with the fact that the UN Secretary-General specifically focused on the need for Iraq to be transformed into a free-market economy: '[i]t is against the backdrop of this situation, further exacerbated by the recent war and the attendant breakdown of social services, that the development of Iraq and the transition from a centrally planned economy to a market economy needs to be undertaken'.[35] Even though such a statement does not automatically render the reforms undertaken by the CPA lawful, it indicates that the UN welcomed the general direction of the CPA's reforms. Even though the reasons for this convergence are open to speculation, the earlier denunciation of the use of force against Iraq as unlawful provides strong indications that, in this instance, no problem of illegality was seen to exist. It is neither a coincidence

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[29] Resolution 1483 (*supra* note 10), Paragraph 8.

[30] See Section 5:3:2 'Post-1991 international territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the present thesis.

[31] Resolution 1483 (*supra* note 10), Paragraph 8.

[32] See Section 5:3:2 'Post-1991 international territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the thesis at hand.

[33] For an overview of the neoliberal agenda of the IFIs that draws parallels between them and the nineteenth-century system of capitulations, see: D. P. Fidler, 'A Kinder, Gentler System or Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization' (2000) 35 Texas International Law Journal 388. See also: Anghie (*supra* note 2).

[34] M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1, 23.

[35] Report of the Secretary-General pursuant to paragraph 24 of Security Council Resolution 1483 (2003), 17 July 2003, UN SC S/2003/715, July (2003) para. 84.

nor a mere discursive stratagem that the CPA quoted repeatedly both Resolution 1483[36] and the report of the Secretary General, in order to affirm the legality and legitimacy of its actions. For example, the Preamble of Order 81, which fundamentally altered Iraqi patent law to the benefit of international agribusiness,[37] reads as follows:

> Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a free market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect.[38]

The above analysis should not be taken to mean that the Resolution automatically authorised the measures adopted by the CPA in their totality. In fact, even the lawyers of the Authority doubted that, especially in the case of investment law reform.[39] However, my argument is that the conviction shared by numerous international legal scholars that the reforms were unlawful is not outright supported by the text of Resolution 1483.[40] This is partly because the Resolution was the outcome of intense

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[36] It was a standard practice of the CPA to invoke UNSC Resolution 1483 in the preambles of its orders/regulations: 'Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant UN Security Council resolutions, including Resolution 1483 (2003)' Coalition Provisional Authority Order 20 'Trade Bank of Iraq' CPA/ORD/17 July 2003/20.

[37] 'The production crisis opened the door for the agricultural business to move in: the seed bank destroyed, the harvest yield dramatically down due to the natural disaster and years of war, Iraqi farmers were vulnerable, desperate, exploitable. They needed seed, and agribusiness-backed relief efforts were there to provide it. Bremer Order 81 sealed the farmer's permanent dependence on the agribusiness giants.' W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015), 144-45.

[38] Coalition Provisional Authority Order 81 'Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law' CPA/ORD/26 April 2004/81.

[39] 'CPA lawyers were generally opposed to the sale of Iraq's industries, on the grounds that such sales violated the Hague Convention. What if a sovereign Iraqi government objected to privatization? You couldn't reverse the sale of a factory. Better to leave it to a future Iraqi administration, the CPA lawyers said.' R. Chandrasekaran, *Green Zone: Imperial Life in the Emerald City* (Bloomsbury, 2010), 131.

[40] 'Despite this language, Resolution 1483 should not be read as a clear endorsement of the CPA agenda.' G. H. Fox, *Humanitarian Occupation* (CUP, 2008), 267. 'While some changes to the legislation and administrative structures of Iraq may have been permissible on the basis of security, public order, or furthering humanitarian objectives, on the basis of the Fourth Geneva Convention, more wide ranging reforms in terms of economic governance in Iraq were not lawful.' L. F. Eslava Arcila, 'Occupation Law: (Mis)use and Consequences in Iraq' (2007) 27 Revista Contexto 79. 'These reforms go considerably beyond what is necessary to re-establish public order and civil life.' R. Wolfrum, 'Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference' (2005) 9 Max Planck Yearbook of United Nations Law 1, 23. Even Benvenisti, who supports a relaxed interpretation of the 'conservationist principle' concluded that the

bargaining and compromise, and, therefore, it incorporated diverging demands and visions. Much more fundamentally, though, the resolution reflected a conflict between formal legal validity and the 'real life' of international law, which is heavily underpinned by ideological and political struggles. As was already mentioned in Chapter 5, Benvenisti has argued convincingly that the underlying ideological assumption behind the 'conservationist principle' is a *laissez-faire* radical distinction between public power (in this case, the occupier) and private interests.[41] However, if we accept that 2003 represents the apogee of (neo)liberal interventionism, we also need to accept that this *laissez-faire* understanding had been replaced by an appreciation of the importance of interventionism for the creation, consolidation and expansion of markets.[42] In this context, perceptions of what is necessary to maintain peace and security are radically different in comparison to the perceptions of the nineteenth and early twentieth century.

After all, the occupation of Iraq took place after a series of highly intrusive and interventionist instances of ITA, such as the ones in Bosnia and Herzegovina, Kosovo, and East Timor.[43] As argued in Chapter 5, actors involved in ITA, such as the UN or different states, did not consider the laws of occupation to be applicable, even though the doctrinal debate was far from being settled.[44] My argument here is that, roughly after 1990, international law was undergoing a process of radical transformation. At the time, the core principles and rules of the UN Charter, such as equal sovereignty, non-intervention and the prohibition on the use of force, were still nominally at the core

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reforms of the CPA were 'a radical departure from the "conservationist principle" mandated under the law of occupation'. E. Benvenisti, *The International Law of Occupation* (2nd edn, OUP, 2012), 268. Charlesworth provides a more nuanced assessment of the legal situation: 'The Resolution emphasised the transitional nature of the CPA and looked forward to "an internationally recognized, representative government … established by the people of Iraq". On the other hand, Resolution 1483 contemplated a sweeping role for the CPA, with a subsidiary role to be played by the UN and an interim Iraqi Administration (to be created primarily by the Coalition). Resolution 1483 allowed the Coalition to exercise full governmental authority in Iraq and provided few restrictions on its actions; there was a minimal accountability mechanism through an obligation to report to the Security Council.' H. Charlesworth, 'Law After War' (2007) 8 Melbourne Journal of International Law 233.

[41] See: Benvenisti (*supra* note 40), 70. For the broader significance of this argument in the context of ITA, see Section 5:3:1. 'After the 'end of history': international territorial administration in the years of triumphant neoliberalism' of the present thesis.

[42] For a mapping of the history and core assumptions of neoliberalism, and their significance for international law, see Section 5:1. 'A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism' of this thesis.

[43] See Section 5:3:2. 'Post-1991 international territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the thesis at hand.

[44] See Section 5:3:1 'After the 'end of history': international territorial administration in the years of triumphant neoliberalism' of the present thesis.

of the international legal order. As recently as 2012, Crawford argued that '[r]eports of the death of sovereignty are much exaggerated',[45] while the ICJ has repeatedly confirmed the basic findings of the *Nicaragua* case regarding non-intervention and the prohibition on the use of force.[46] However, in 2003, a 'parallel' system of international legality was being formulated. After all, as has been noted in a somewhat different, yet related, context, '[t]he Court's judgments may be of utility in this endeavour, but only subject to the caveat that the Court remains a mirror against which international lawyers may assess the present state of international law; it is not an engine for its future development'.[47]

As has already been mentioned, the structural adjustment projects of the IFIs constituted intrusive mechanisms of social engineering, disciplining states to a strict neoliberal economic and political model.[48] At the same time, ITA was performing similar functions in post-conflict societies, by linking peace and security to neoliberal reform and to the promotion of a formal(ist) conception of liberal democracy.[49] Crucially, this new 'great transformation' was not confined to peripheral, post-colonial states. During the same period, thousands of bilateral investment treaties (BITs) came into force, bringing about consistent liberalisation of investment policies on an international level. Even though the origins of contemporary international investment law can be traced back in the first post-war decade,[50] the end of the Cold War signalled their numerical proliferation and their institutional

[45] J. Crawford, 'Sovereignty as a Legal Value' in J. Crawford and M. Koskenniemi, *The Cambridge Companion to International Law* (CUP, 2012), 132.

[46] Amongst many: 'In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, the Court made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State (*ICJ Reports 1986*, p. 108, para 206). […] The Court further affirms that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations" (ibid., 109-10, para. 209). *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment*, Merits [2005] ICJ Rep. 168, p. 168, para. 164.

[47] G. I. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"', (2013) 83 British Yearbook of International Law 13, 60.

[48] See note 35 above.

[49] See Section 5:3:2 'International territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the present thesis.

[50] See: N. Tzouvala, 'The Ordo-liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale' (2016) European Yearbook of International Economic Law (forthcoming).

refinement.[51] To mention but one example, investment tribunals developed conceptually incoherent, yet expansive and restrictive concepts, such as the one of 'regulatory takings' that imposed strict limits on permissible state action *vis-à-vis* foreign investment.[52] Disciplining states' control over capital, dismantling the Keynesian state, and disciplining the emerging post-colonial states were the stated objectives of the architects of international investment law already since the 1950s,[53] and the rise of the field after 1990 needs to be understood through this prism. During the same period, international trade law, both in the form of the WTO and in that of regional trade agreements such as NAFTA, was transformed as well. In a nutshell, the regulation of international trade moved from the paradigm of 'embedded liberalism' to that of neoliberalism. In the course of the first three post-war decades, the GATT represented a delicate balance between free trade and desired state policies, such as full employment.[54] However, after the 1970s, the focus of international trade law gradually shifted from the reduction of tariffs to much more comprehensive management of non-tariff barriers.[55] In

[51] 'It was in the neoliberal phase (1990-2004) that harder treaties with strong and inflexible rules on investment protection came to be made. The treaty practice also reached the 3,000 mark during this time.' M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (CUP, 2015), 39.

[52] For a poignant critique of the 'empty circularity' of the concept, see: A. Rasulov, 'The Empty Circularity of Regulatory Takings: The Legacy of a Legal Realist Critique for a 21st-Century Context' in U. Mattei and J. D. Haskell, *Research Handbook on Political Economy and Law* (Elgar Publishing, 2015).

[53] To give but one example, take the Abs Shawcross Draft, a draft international investment treaty that was never formally adopted, but had enduring influence over international investment law. The drafters, in their introductory comments, suggested quite clearly the perceived problem to which the Draft Convention was responding: '[t]hese principles have a broad basis in the practice of civilized states and the findings of international tribunals, *though during the last few decades in some countries there has been a tendency to disregard them*': see 'The Proposed Convention to Protect Private Foreign Investment' (1960) 9 Journal of Public Law 116, 119 (emphasis added). Given that the Draft was promulgated in 1957, one need to conclude that the model the drafters were taking aim at was Keynesian interventionism.

[54] 'It is therefore common among historians of the trade regime to talk of the initial GATT as being built upon, and sustained by, a shared normative commitment to interventionist domestic policies of a broadly Keynesian kind - that is, a broadly shared understanding of what constituted the "normal" and legitimate purposes for which governments might intervene in economic life.' A. Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (OUP, 2011), 195.

[55] 'In Baldwin's (1970) inimitable analogy, the reduction of tariff was akin to the draining of a swamp, revealing many rocks and tree trunks that had been hidden by the water - i.e. making non-tariff barriers more visible steadily more visible. In the following rounds – Tokyo (1973-79), Uruguay (1986-94), and Doha (2001-present) – the shift toward NTBs continued. Negotiators had originally understood the term NTBs to refer to non-tariff barriers imposed for economic reasons (antidumping (AD), countervailing, safeguards). Gradually, it expanded to encompass all areas of non-fiscal regulation.' B. M. Hoekman and P. C. Mavroidis, *World Trade Organization (WTO): Law, Economics, and Politics* (2nd edn, Routledge, 2016), 12.

turn, this transformation of international trade law meant that an increasing number of measures that were formerly perceived as background regulations to trade were reconceptualised as discriminatory and, therefore, only permissible if they could be justified under the exceptions of Article XX of GATT.[56]

This entrenchment of neoliberal conceptions of the state and the economy in international law was also vividly present in the constitutive documents of regional organisations, such as the EU/EC. Admittedly, ordo-liberalism, the German variant of neoliberalism, was always at the heart of European integration:

> European competition law has developed under the influence of the ordoliberal school of thought, according to which the actual goal of competition policy is the "protection of individual economic freedom of action as a value in itself, or vice versa, in the restraint of undue economic power". The concept of abuse under Article 82 also bears the imprint of ordoliberal thinking, which first influenced the development of an identical concept of abuse under German competition law.[57]

Writing from a broader and more critical perspective, Dardot and Laval have also argued that, already, the Treaty of Rome (1957) 'began to establish strict rules to prevent competition being distorted by discriminatory measures, abuses of dominant position and state subsidies'.[58] This 'competitivism' constitutes, as has already been argued in Chapter 5,[59] one of the core characteristics of the neoliberal paradigm. More so, the Maastricht Treaty and the creation of the European Monetary Union (EMU) stabilised, refined and, importantly, 'constitutionalised' the neoliberal character of the Union. To begin with, Article 4 stipulated that the Community and the Member States shall establish 'an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with

[56] '[A]s Article III was broadened, the task of determining the legitimacy or illegitimacy of particular distorting regulations fell primarily to Article XX. As it is well known, one of the most significant consequences of this development was the importation of a mean-and rationality test into certain paragraphs of Article XX'. Ibid., 265.

[57] For the argument that EU competition law, and in particular Article 102TFEU, has been influenced by ordoliberalism, see: E. Rousseva, 'Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints' (2005) 42 Common Market Law Review 587, 590–91. See also: D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), 264.

[58] P. Dardot and C. Laval, *The Neo-Liberal Way of the World: on Neo-Liberal Society* (tr G. Elliott) (Verso, 2013), 198.

[59] For the replacement of 'free exchange' with 'competition' in neoliberal theory and its political implications, see: Section 5:1 'A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism' of this thesis.

the principle of an open market economy with free competition'.[60] In so doing, the Maastricht Treaty elevated the 'open market economy with free competition' to a central principle for the organisation, both of the Community and the Member States. Moreover, fiscal discipline rules were incorporated into the Maastricht Treaty, imposing limits on the deficit and debt levels states were allowed to run.[61] Crucially, the European Central Bank (ECB) was modelled upon the solidly ordo-liberal German *Bundesbank*. The ECB became independent from national governments following the ordo-liberal imperative that monetary policy should be decoupled from (mass) politics:

> When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.[62]

It needs to be borne in mind that the fact that the ECB was independent from national governments did not mean that it was an apolitical organ. Rather, it was subjected to the imperatives of the competitive market. After all, the case of West Germany indicates that independent central banks are relatively insulated from democratic mass politics, but play an actively political role, largely restrained from the limits of popular pressure:

> several studies of policymaking in West Germany have suggested that on occasion the Bundesbank has distorted policy for the purpose of removing from office elected individuals or governments it found uncongenial. These accusations throw into a different light the normative question of who should control policy.[63]

Theorists working in the intersection between international law and international relations have proposed the term 'new constitutionalism' to describe this transformation of international law after

[60] Consolidated Version of the Treaty on European Union, Article 4, 2006 OJ C 321 E/ [hereinafter TEU pre-Lisbon].

[61] 'Member States shall avoid excessive government deficits. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline.' Article 104, Ibid.

[62] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community Article 130.

[63] J. Forder, 'Central Bank Independence: Economic Theory, Evidence and Political Legitimacy' in P. Arestis and M. Sawyer (eds), *The Rise of the Market: Critical Essays on the Political Economy of Neo-Liberalism* (Edward Elgar, 2004), 162.

1990.[64] Having as his starting point the 1997 World Bank Report *The State in a Changing World,* Gill focuses on the insistence of the World Bank to create mechanisms locking in neoliberal policies:

> [o]nce reforms are announced, their lasting success may depend on designing and implementing policies in ways that credibly signal that the government will not renege on its promises. A number of possible lock-in mechanisms are available, all with the same basic logic: to provide checks that restrain any impulse to depart from announced commitments.[65]

Otherwise put, the Bank wanted to ensure that the neoliberal reforms implemented in different contexts would be difficult to reverse and become deeply entrenched in the institutional and legal fabric of states: 'experience suggests that long-run goals are better served by sticking to self-imposed restraints and living with the rigidities they inflict'.[66] Three different techniques are proposed to that end: the empowerment of the judiciary, separation of powers and, crucially for our analysis, external disciplining mechanisms including international agreements and agreements with multilateral organisations. Invoking the example of the WTO, the World Bank argued that:

> [I]nternational agreements are a second mechanism for strengthening commitments not anchored by any domestic institution. […] Clearly, sovereign countries can still reverse course on, for example, trade policy by withdrawing from such agreements. But they then have to calculate not just the benefits and costs of the policy reversal, but also the broader costs of reneging on an international commitment for which their partners will hold them accountable. The threat of international censure makes countries less likely to reverse course.[67]

Drawing from this suggestion, Gill argues that we are witnessing the emergence of a 'new constitutionalism' that consists of 'the proliferation of policies and legal measures that are intended to reinforce the rights and political representation of investors, and in doing so to strengthen the power of capital on a world scale'.[68] Further, he points out that 'the aim of new constitutionalism is to allow dominant economic forces to be increasingly insulated from democratic rule and popular accountability'.[69] Even though the concept of 'constitutionalism' is may not be ideal to describe this trend,[70] this does not deprive Gill's arguments of their descriptive and normative significance. It is

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[64] S. Gill, 'New Constitutionalism, Democratization and Global Political Economy' (1998) 10 Pacifica Review 23. For a more recent engagement with the concept that focuses on specific international legal regimes, see: S. Gill and A.C. Cutler (eds), *New Constitutionalism and World Order* (CUP, 2014).

[65] World Bank, *World Development Report 1997: The State in a Changing World* (OUP, 1997), 50.

[66] Ibid.

[67] Ibid., 101.

[68] Gills 'New Constitutionalism' (*supra* note 64), 37.

[69] Ibid., 23.

[70] One of obvious problems here is that constitutionalism is commonly seen as the corollary of community which in turn is characterised by 'binarity' and 'commonality': 'Simply put, this discussion acknowledges that when invoking community as part of constitutional governance, the importance of its meaning must, at a minimum, be acknowledged, and cognisance of its implications recollected.' A. O'Donoghue, *Constitutionalism*

argued here that the end of the Cold War signalled the rise of international legal mechanisms ranging from ITA and structural adjustments to BITs and increasingly interventionist international trade norms. Nominally, these mechanisms require state consent to be implemented. Therefore, sovereignty and state consent remain at the heart of the international legal order. However, the intensification and increased intrusiveness of such mechanisms meant that, in the course of the first post-war decades, a new, implicit 'standard of civilisation' was in the making. According to this implicit standard, certain forms of statehood were inherently problematic and destabilising and therefore needed to be disciplined and modelled along neoliberal lines. Admittedly, this system never acquired the explicit, formal character of the 'standard of civilisation' during the nineteenth century.[71] However, it can be detected in numerous legal documents, including the Dayton Agreement regarding Bosnia and Herzegovina, UNSC Resolutions 1244 and 1272, and the subsequent practice of international legal actors regarding Kosovo and East Timor respectively.[72]

Any analysis of post-Cold War international law that aspires to understand how international law shapes the world, instead of only focusing on a formalistic, and often untenable, distinction between legality and illegality needs to take into account the above deliberations when discussing the neoliberal reconstruction of Iraq, UNSC Resolution 1483, and international law. When discussing international law and the occupation of Iraq, we need to locate the reforms undertaken within the broader context of transformation of international law at the time. Instead of trying to 'fit' the reforms within the binary scheme of legality and illegality, we should situate them within the broader trend of transformation of international law after 1990. In 2003, international law was undergoing a process of radical transformation. While the core formal features of the system remained nominally intact, international law and institutions gradually acquired a thick nexus of disciplinary mechanisms that enabled social engineering towards a neoliberal model of statehood. Acknowledging this transformation process enables us to comprehend the contradictions both of Resolution 1483 and of the state practice and *opinio juris* of numerous states at the time, including the two main occupying

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in Global Constitutionalisation (CUP, 2014), 60-61. For binarity and commonality as the distinctive characteristics of community see: Ibid., 61-69.

[71] The core argument of Chapter 1 of the present thesis is that the 'standard of civilisation' was linked to state transformation and the development of capitalist societies, rather than with cultural or inflexible racial concepts. See generally: Chapter 1 '1776-1914: The long century of the 'standard of civilisation' in international law' of the present thesis.

[72] For an overview of the normalisation of neoliberal reforms through the practice of ITA, see Section 5:3:2 'International territorial administration and the normalisation of neoliberal state-building: Bosnia and Herzegovina, Kosovo, East Timor'.

powers in Iraq, the US and the UK.[73] Crucially, this idea of parallel transformation enables us to do so without resorting to 'psychological' arguments like that posed by Fox, who insists on describing Resolution 1483 as 'schizophrenic' (sic).[74] Far from being 'schizophrenic', Resolution 1483 incorporated not only geopolitical tensions, but, much more fundamentally, the contradictions between the past and the evolving present of international law. While the laws of occupation were nominally still valid, the 'real life' of international territorial administration and a complicated nexus of structural adjustments, international investment treaties, practice of regional and global organisations, such as the EU or the WTO, were advancing a radical reorganisation of international law towards a system that designated neoliberal statehood as the only legitimate form of statehood. In the (reluctant) words of Fox, 'the transformation of Iraq was not without normative roots'.[75] After all, international lawyers have long distinguished between breaches of international law that indeed strengthen the breached rule, for example by prompting other states to reaffirm its validity, and breaches that, when accumulated and if accompanied by the necessary *opinio juris* and inaction, or even approval, on the behalf of other states, lead to legal transformation.[76] Therefore, even if the reforms undertaken by the CPA are seen as unlawful, the overall evolution of international law after 1990 indicates that they were part of a broader process of transformative illegality. It is under the lens of this argument that the substance of the political and economic reforms in Iraq will be approached in the next section of this chapter.

[73] Marten Zwanenburg has mapped briefly the *opinio juris* and state practice regarding the laws of occupation, Iraq and Resolution 1483, concluding that: '[S]ubsequent state practice (as exemplified by the Netherlands) would appear to suggest that Resolution 1483 has created a "carve out" from the law of occupation. In response to a question by a member of the House of Lords concerning the legality of Order 39, a UK government representative stated that the content of the Order was decided by the Iraqi Interim Governing Council and endorsed by the CPA. This could be read as implying that the CPA could in certain circumstances derogate from the law of occupation, provided that the Iraqi authorities agreed.' M. Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', (2004) 86 International Review of the Red Cross 745, 766-67.

[74] 'The resolution itself echoes this schizophrenia, espousing both a commitment to reform and fidelity to international law within a single paragraph.' Fox (supra note 28), 260; see also: Fox (*supra* note 40), 267-68.

[75] G.H. Fox, 'Transformative Occupation and the Unilateralist Impulse' (2012) 94 International Review of the Red Cross 237, 239.

[76] '[B]reaches of international law may, paradoxically, strengthen the law rather than weaken it, if the offending State is condemned and isolated. Conversely, as I shall explain shortly, if other States remain silent in the face of an apparent violation of the law, it may be that the first steps towards a change in the law are being taken.' V. Lowe, *International Law* (OUP, 2007), 46.

6:2 Re-inventing Iraq: neoliberalism as civilisation

As has already been made clear, a full appreciation of the significance of the Iraq war for our understanding of international law requires looking beyond the initial events of the invasion. A critical account of the invasion and the occupation needs to engage extensively with the rapid and radical reforms of the economic, political and social system of Iraq by the CPA. Natarajan has remarked that:

> Angry articles were written in academic journals and newspapers condemning the legal reasoning of the Coalition and its few supporters. It was easy to sympathize with scholarly indignation. The invasion was in many ways an affront to international law, particularly the laws on the use of force. At the same time, there was something faintly familiar about the Coalition's reasoning for the invasion. This feeling of déjà vu escalated once regime change was implemented and the Coalition began the task of nation-building. The idea of recreating Iraq - trying to change it for the better - was not a new one.[77]

Further, Fox has observed that 'it is no exaggeration to describe the CPA as having engaged in a social engineering project in Iraq'.[78] Moreover, and faithful to the prioritisation publicly expressed by the CPA's head, Paul Bremer,[79] this social engineering process pushed towards the reconfiguration of Iraq into a society based on private property rights, and on competition as the organising principle of economic and social life, ergo a neoliberal society.

6:2:1 Constructing the 'spontaneous': CPA and economic reforms in Iraq

The CPA made clear its intention to undertake sweeping reforms in Iraq with its first issued Regulation, through which it assumed 'all executive, legislative and judicial authority necessary to achieve its objectives'[80] and vested orders and regulations of the CPA with superior legal validity in relation to Iraqi law.[81] Subsequently, with its first Order, the CPA promoted the removal of Ba'ath

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[77] U. Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 Leiden Journal of International Law 799, 800. Despite significant methodological problems, Naomi Klein's work can also provide us with a helpful factual background: N. Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Penguin, 2008), 323-60.

[78] Fox (*supra* note 28), 208.

[79] Bremer identified the transformation of Iraq's economy away from central planning as 'the most immediate priority' of the CPA: L. Paul Bremer, *Address to the World Economic Forum* in S. Talmon, *The Occupation of Iraq: Volume 2: The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (Hart Publishing, 2013), 834.

[80] Section 1.2. Coalition Provisional Authority Regulation Number 1 CPA/REG/16 May 2003/01.

[81] 'Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.' Section 2 ibid.

members from public administration in an attempt to foster the de-Ba'athification of Iraqi society.[82] In practice, this meant that members of the top three levels of the party were directly removed and banned from public positions and that all individuals occupying significant positions in the administration were deemed suspect of having ties with Ba'ath. One could argue in good faith that this move was necessary for the democratic transformation of Iraq and for a decisive move away from the dictatorial regime of Saddam Hussein, and there is definitely truth to this assertion. Unsurprisingly, the CPA attempted to explain and legitimise this choice by reference to de-Nazification in post-war Germany.[83] Nonetheless, the decision gave rise to significant practical difficulties and, importantly, constituted a major impediment for Iraq's public sector. As Lt Gen. Sánchez, Commander of Coalition forces in Iraq at the time, noted: '[e]ssentially, it eliminated the entire government and civic capacity of the nation. Organizations involving justice, defense, interior, communications, schools, universities, and hospitals were all either completely shut down or severely crippled, because anybody with any experience was now out of a job.'[84] For example, in its final public account of its perceived achievements, the CPA noted that 12,000 Ba'ath members were dismissed from primary and secondary education alone.[85] As the report of the US Special Investigator General for Iraq Reconstruction (SIGIR hereafter) observed: 'the consequences of the de-Ba'athification order quickly became clear: it reduced the ranks of Iraq's capable bureaucrats and thus limited the capacity of Iraqi ministries to contribute to reconstruction'.[86]

This decision was, further, not unrelated to the wider tide of profound reconstruction and minimisation of the public sector undertaken by the CPA. This decision only resonated in the context of the radical reconstruction of Iraq to a neoliberal, outsourced state. Crucially, this radical and seemingly impracticable removal of numerous public servants (broadly conceived) is not unique in the history of social transformation and international law. As was stressed earlier in this thesis, the abolition of feudalism in Japan under extraterritoriality brought about the 'liberation' of significant

[82] Coalition Provisional Authority Order Number 1 'De-Ba`athification of Iraqi Society' CPA/ORD/16 May 2003/01, Coalition Provisional Authority Order Number 5 'Establishment of the Iraqi de-Ba'athification Council' CPA/ORD/25 May 2003/05.

[83] In his autobiography, Bremer, the head of the CPA, wrote: 'In this respect, de-Baathification was similar in its intent and scope to de-Nazification in post-war Germany, which banned the swastika and portraits of Hitler.' L. P. Bremer III, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon and Schuster, 2006), 42.

[84] Lt Gen. Ricardo S. Sanchez, *Wiser in Battle: A Soldier's Story* (HarperCollins, 2008), 184.

[85] Coalition Provisional Authority, *An Historic Review of CPA Accomplishments 2003-2004* (June 2004, Bagdad), 23.

[86] Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience*, 74, available at: http://cybercemetery.unt.edu/archive/sigir/20131001113012/http://www.sigir.mil/publications/hardLessons.html [last accessed 20 May 2016].

numbers of samurais, in an attempt to abolish private armies. Further, in their attempt to create an army faithful to the ideas of nationhood and statehood, Japanese authorities did not employ these samurais in the newly established Japanese army, even though it would have been a practicable solution in terms of technical knowledge and unemployment management.[87] Bearing in mind the limitations of the analogy, the Japanese case highlights how seemingly impracticable or irrational decisions acquire meaning and purpose if social transformation objectives are factored in. Hence, apart from the reasonable demand for the removal of oppressive elements, de-Ba'athification was also consistent with the idea of a limited public sector that would denounce ideas of central planning and subscribe to an intensive free-market ethos. Bremer himself acknowledged that de-Ba'athification 'demonstrated that we intended not just to throw of the brutal tyranny of Saddam, but also to establish in its place a new political order'.[88] The CPA's commitment to altering the prevalent economic and administrative discourse was also evident in its initiative to organise weekly 'free-market' seminars for 'people from the ministries, Iraq's nascent "private sector", and younger potential political leaders'.[89]

This was necessary in light of the overall economic reforms promoted by the CPA. By now it is uncontroversial that the CPA engineered the transition from a centrally-planned economy to a free-market economy. After all, it was Bremer's publicly stated position that: '[m]arkets allocate resources much more efficiently than politicians'.[90] Nevertheless, this appears to be an overly broad statement, to the extent that the vision of the CPA for Iraq was not generally the transition to a free-market economy but, much more specifically, the construction of a solidly neoliberal economy, without any form of state planning, characterised by strong investment and property laws that secure private actors' rights, full-scale free trade, an independent central bank and flat, minimal taxation with competition being elevated to the organising principle of economic and social life.[91] This distinction is essential to the extent that currently almost all national economies on a global level subscribe to some

[87] See Section 2:2:1 'Japan's successful encounter with extraterritoriality: 1858-1899' of the present thesis.

[88] Bremer (*supra* note 83), 45; 'Only someone deeply inclined to see government purely as a burden and public sector workers as dead wood could have made the choices Bremer did.' Klein (*supra* note 76), 352.

[89] Bremer (*supra* note 83), 63.

[90] Bremer (*supra* note 79), 835; 'In addition to these political and legislative adjustments, the CPA was required to introduce an economic structure oriented by capitalist theory and premised upon economic liberalism, where the pursuit of individual interest in a free market was considered to be an essential precondition for any durable liberal democracy.' R. Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing, 2013), 198.

[91] 'If carried through, the measures will present the kind of wish-list that foreign investors and donor agencies dream of for developing markets. […] The unspoken wish is that this will create a poster child for the recalcitrant economies surrounding it.' 'Iraq's Economic Liberalisation: Let's All Go to the Yard Sale.' (*The Economist*, 25 September 2003).

version of market-driven economy, even to some version of neoliberalism. Nonetheless, the CPA did not attempt to replicate the model of Sweden, or even that of the USA, but explicitly drew inspiration from the transition processes of Eastern and Central Europe in the early 1990s that were marked by a rapid and robust introduction of extreme free-market reforms. Addressing the World Economic Forum, Bremer made a clear reference to post-communist states as an inspiration and blueprint for the reconstruction of Iraq: '[i]n the past 15 years, other countries have attempted to break this cycle. The experience of these economies shows that there is no substitute for a vibrant private sector.'[92] Four major areas of economic reform can be identified here: tax law, trade and investment law with an emphasis on the regulation of Foreign Direct Investment (FDI), the engagement of the CPA with state-owned enterprises (SOEs) and finally the question of the proper role of the central bank in a capitalist economy.

One of the most profound reforms promoted by the CPA was the introduction of an income tax rate of a maximum 15 per cent both for individuals and corporations.[93] The introduction of low and flat tax rates rests upon some core premises of neoliberal economic, political and moral thought. First, taxation cannot constitute the means for wealth redistribution to the extent that this would incentivise leisure at the expense of work, and it would also deter the perceived productive elements of each society to create more wealth through personal effort, since this enrichment will be 'penalised' through higher tax rates. Harvey has summarised the centrality of lowering taxes in neoliberal theory and practice as follows:

> The economic ideas marshalled in support of the neoliberal turn amounted, Blyth suggests, to a complex fusion of monetarism (Friedman), rational expectations (Robert Lucas), public choice (James Buchanan, and Gordon Tullock), and the less respectable but by no means uninfluential 'supply-side' ideas of Arthur Laffer, who went so far as to suggest that the incentive effects of tax cuts would so increase economic activity as to automatically increase tax revenues (Reagan was enamoured of this idea). The more acceptable commonality to these arguments was that government intervention was the problem rather than the solution, and that 'a stable monetary policy, plus radical tax cuts in the top brackets, would produce a healthier economy' by getting the incentives for entrepreneurial activity aligned correctly.[94]

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[92] Bremer (*supra* note 80), 835; 'Coalition officials relied heavily on the experiences of Eastern Europe and the former Soviet Union in assembling their transition blueprint for Iraq. Based on their review of reforms in these societies, Coalition officials concluded that the blueprint contained four components: stabilization, liberalization, privatization, and legal and regulatory reform.' A. E. Henderson, *The Coalition Provisional Authority's Experience with Economic Reconstruction in Iraq Lessons Identified* (United States Institute for Peace Special Report 138, April 2005), 11.

[93] 'The highest individual and corporate income tax rates for 2004 and subsequent years shall not exceed 15 per cent. 'Section 4 Coalition Provisional Authority Order Number 37 Tax Strategy for 2003 CPA/ORD/19 September 2003/37. Order 37 was updated, but not substantively altered in February 2004: Coalition Provisional Order Number 49 'Tax Strategy of 2004' CPA/ORD/19 February 2004.

[94] D. Harvey, *A Brief History of Neoliberalism* (OUP, 2005), 54.

In an explanatory note, the CPA endorsed these approaches, defending the flat 15 per cent corporate income tax rate:

> This low rate, compared to the prior rate of up to 40 per cent, will encourage reinvestment of company profits. This in turn will encourage increased capital investment and job creation in Iraq by private sector firms. The lower flat rate also will lead to increased revenue collection as companies respond to Iraq's transition to a free market-based economy.[95]

Given the condition of Iraq's economy, this radical decrease of tax rates resulted in a destabilisation of state revenue and in the elevation of the oil industry into the only actual source of income. Crucially, all contractors and sub-contractors 'who supply goods directly to or on behalf of the Coalition Provisional Authority and Coalition Forces' were exempted from taxation altogether.[96] The resulting budgetary imbalance was so stark that, in their joint report, which otherwise adopted the same basic principles as the CPA's reforms, the UN and the World Bank noted that 'Iraq's draft 2004 budget assumes realistic oil revenue of US $12 billion, but very little non-oil revenue, reflecting that view that introducing low tax rates would stimulate economic growth' and went on to recommend that 'a broader-based revenue effort should be adopted'.[97] However, it is worth bearing in mind that the CPA was not acting in an unprecedented manner here. For example, in Kosovo, UNMIK had also introduced a system of flat rate corporate tax (20 per cent), which was later reduced to 10 per cent,[98] and introduced extensive exemptions for its private contractors.[99]

The determination of the CPA to liberalise trade was materialised first through Iraq acquiring observer status at the WTO,[100] and secondly through the decisive abolition of '[a]ll tariffs, customs duties, import taxes, licencing fees and similar surcharges for good entering or leaving Iraq, and all other trade restrictions that may apply to these goods'.[101] Both WTO membership and this unprecedented liberalisation rest upon the Ricardian idea of the 'comparative advantage' as the main justification for free trade: if each and every state trades in that which they do relatively better - even if they are worse than others - everyone will be better off in the end.[102] Without examining the merits of this proposition, its immediate consequence is the inability of a state to apply protectionist

[95] Coalition Provisional Authority Explanatory Note, CPA Order Number 49, Strategy of 2004.

[96] Section 3.2.d. CPA Order 37 (*supr*a note 93).

[97] 'United Nations/ World Bank Joint Needs Assessment' (October 2003) para. ix.

[98] Section 5, United Nations Interim Administration Mission in Kosovo, Regulation No 2004/51, 'On Corporate Income Tax' 4 December 2004 UNMIK/REG/2004/51.

[99] Section 6 (d) ibid.

[100] World Trade Organization, 'Iraq-Request for Observer Status' WT/L/560 (23 January 2004).

[101] Section 1 Coalition Provisional Authority Order 12 'Trade Liberalization Policy' CPA/ORD/7 June 2003/12.

[102] For an overview of the argument, see: D. Alessandrini, 'WTO and Current Trade Debate: An Enquiry into the Intellectual Origins of Free Trade Thought' (2005) 11 International Trade Law and Regulation Journal 53.

measures, in order to develop new, more advanced industries.[103] Therefore, it becomes both practically impossible and theoretically undesirable for developing states to alter significantly their economic structure and to develop industries of high added value. As a consequence, developing states remain over-dependent on the production of raw materials or on industries of low technology and low added value. In this specific case, and given the destructive effects of Saddam Hussain's wars and mismanagement, as well as the adverse impacts of the UN embargos, rapid trade liberalisation meant in practice that the reconstruction of some of Iraq's industries and the diversification of Iraq's economic and tax basis became impossible. Given also the low tax rates and wide tax breaks to CPA-related contractors, this meant that the revenues of the administration were unsustainably low, which in turn explains why the US had to approve financial assistance packages of historical dimensions[104] Arguably, this rapid trade liberalisation was a direct outcome of the neoliberal commitment of the CPA. Chang has emphasised the centrality of free-trade for neoliberal thought:

> Belief in the virtue of free trade is so central to the neo-liberal orthodoxy that it is effectively what defines a neo-liberal economist. You may question (if not totally reject) any other element of the neo-liberal agenda – open capital markets, strong patents or even privatisation – and still stay in the neo-liberal church. However, once you object to free trade, you are effectively inviting ex-communication.[105]

The reform of investment law was underpinned by effectively the same conception about acceptable economic models and the bases of growth and prosperity. The preamble of Order 39 exemplifies this view, since FDI is identified as the single most important means that 'will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis'.[106] Therefore, it does not come as a surprise that, as Fox has argued, foreign investment reforms were potentially the most far-reaching the CPA undertook.[107] This proposition is supported by Section 3 of Order 39, which explicitly states that '[t]his Order replaces all existing foreign investment law'.[108] In terms of specific reforms, the Order removed all nationality restrictions on foreign investment, enabling

[103] See generally: H-J. Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (Bloomsbury Press, 2010).

[104] 'SIGIR's oversight jurisdiction covers about $50 billion in US funds appropriated by the Congress for Iraq—the largest relief and reconstruction effort for one country in US history. This sea of taxpayer dollars flowed to a wide spectrum of initiatives, ranging from training Iraq's army and police to building large electrical, oil, and water projects; from supporting democracy-building efforts to strengthening budget execution by provincial councils; and from funding rule-of-law reforms to ensuring that the Iraqi government sustains what the US program provided. Some of these initiatives succeeded, but, as this report documents, many did not.' SIGIR (*supra* note 86), vii.

[105] Chang (*supra* note 103), 67.

[106] Coalition Provisional Authority Order Number 39 'Foreign Investment' CPA/ORD/19 September 2003/39.

[107] Fox (*supra* note 28), 287.

[108] Section 3 Order 39 (*supra* note 105).

foreign companies and individuals to own as much as 100 per cent of the investment, with the exception of direct investment in natural resources.[109] Perhaps more crucially, the Order enabled foreign investors to

> transfer abroad without delay all funds associated with its foreign investment, including: i) shares or profits and dividends; ii) proceeds from the sale or other disposition of its foreign investment or a portion thereof; iii) interest, royalty payments, management fees, other fees and payments made under a contract; and iv) other transfers approved by the Ministry of Trade.[110]

In practice, such unrestricted capital flows deprive the state of the capacity to tax efficiently investment revenues, and even combat criminal activities, such as corruption or money-laundering.

Thirdly, the future of SOEs became a thorny issue for the CPA, the Iraqi Governing Council and Iraqi society. The starting point of this engagement was that '[i]n the long term, the CPA planned to "corporatize and privatize" the SOEs. Initially, the CPA aimed for small-scale privatization or leasing of competitive SOEs from August to October.'[111] This divergence between long-term and short-term plans was due to popular reactions in Iraq as well as the reluctance of the CPA's international lawyers, who advised against outright privatisations, raising issues of compliance with the laws of occupation.[112] Nonetheless, the CPA promoted the minimisation of the public sector in a number of intertwined ways. First, the CPA outsourced – without directly privatising – numerous core public functions. For instance, both primary and secondary education, water and sanitisation, and the construction of significant infrastructure projects were awarded to private companies, usually American ones. A good example here is the practice of the Program Management Office (PMO), an authority set up by the CPA to manage the reconstruction of Iraq. The PMO had authority over the reconstruction of six major domains: electricity; public works and water; security and justice; communications and transportation; oil; and buildings, education, and health.[113] According to the report of the US Special Inspector General for Iraq Reconstruction, instead of the CPA or the PMO carrying out reconstruction efforts, they outsourced the process to private firms: '[t]he twelve "design-build" construction contractors were awarded indefinite delivery, indefinite quantity (IDIQ) cost-plus contracts for design, engineering, and physical work in the sectors'.[114] Interestingly, the CPA had outsourced its own administrative functions to the extent that it 'ultimately outsourced to private

[109] Section 6.1 ibid.

[110] Section 7.2.d. ibid.

[111] J. Dobbins and others, *Occupying Iraq: A History of the Coalition Provisional Authority* (National Security Research Division, 2009), 225.

[112] See note 39 above.

[113] SIGIR (*supra* note 86), 107.

[114] Ibid., 108.

contractors much of the program-management and oversight responsibilities, thus diluting the government's authority'.[115]

This outsourcing process had both short- and mid-term impact. First, the multiplicity of contractors, sub-contractors and authorities 'resulted in a disorganised and chaotic approach to the country's reconstruction'.[116] Secondly, this chaotic situation and the multiple levels of outsourcing meant that the CPA fell remarkably short of its reconstruction plans: 'By the time the CPA closed its doors at the end of June 2004, the PMO had spent only $366 million of the $18.4 billion IRRF 2 appropriation. Bremer was never able to realize his grand reconstruction vision.'[117] Thirdly, even though the contracts were formally temporary, they created practical policy effects that were difficult to reverse. Relatedly, in one of its more controversial decisions, the CPA decided to place a moratorium on state business cash withdrawals and to extend it to all debt and receivables that ran between state entities before the 1st of June 2003, which were estimated to 1.2 trillion dinars.[118] Simultaneously, private businesses were allowed normal access to their accounts. A mixture of justifications was put forward to explain this choice, ranging from the undeniably high corruption levels of SOE administrations, to the necessity to manage inflation and prevent a liquidity crisis. Again, one need not doubt the sincerity of these claims to observe that the management of these actual problems was disproportionately to the detriment of the public sector. After all, corruption was also endemic in the private sector, the CPA's outsourcing process included. The starkest example here is perhaps a number of contracts between the US Army in Iraq and KBR, a company owned by Halliburton, the chairman of which in the 1990s was the then-US vice-president, Dick Cheney. Still, this did not pose any obstacles to substantial amounts being paid to private enterprises.[119] Moreover, the withdrawals and payments moratorium resulted in the economic strangulation of the SOEs and, as CPA advisors had warned, it undermined particularly the viability of relatively healthy SOEs that would be unable to access their funds and were therefore driven to bankruptcy. Once again, we need to stress the suspicion, or even outright hostility, *vis-à-vis* state or socially owned enterprises that runs deeply in the history of ITA. Both in Bosnia and Herzegovina and in Kosovo, the respective ITA schemes

[115] Ibid., 106.

[116] C. Kinsey, *Private Contractors and the Reconstruction of Iraq: Transforming Military Logistics* (Routledge, 2009), 74.

[117] SIGIR, 114.

[118] Memo from Peter McPherson to Paul Bremer, "Working Capital of State-Owned Enterprises," June 19, 2003; author unattributed, "Two Issues Regarding SOE Bank Balances," July 1, 2003; and memo from Peter McPherson to Paul Bremer, "Treasury Bills on Ministry of Finance Remain Payable," September 19, 2003.

[119] See: Kinsey (*supra* note 115), 77-78.

moved towards the privatisation of SOEs, a fact that is clearly demonstrated in the Constitution of Kosovo that mandates the privatisation of previously communally-held businesses.[120]

Finally, one of the least debated, but nevertheless highly influential, reforms of the CPA was the establishment of an independent central bank. Order 18 stipulated that '[t]he CBI shall have the authority to determine and implement monetary and credit policy without the approval of the Ministry of Finance'.[121] Hence, fiscal and monetary policy were removed from political control,[122] and decision-making in this domain was reserved for specialists and bureaucrats.[123] The danger of hyperinflation was the reason invoked to justify this choice. Indeed, the precedent of Saddam Hussein's governmental mismanagement of fiscal and monetary policy was commonly invoked to justify this decision. It is known that Hussein's regime habitually opted to print money to counter Iraq's serious economic issues, contributing to extremely high inflation levels. Nonetheless, this precedent does not justify the pursued policy in its own right, to the extent that after 1991 Iraq was a *sui generis* economy operating under a strict international embargo. Otherwise put, there is no reason to assume that a democratic Iraqi government operating under relative normalcy would replicate the ill-conceived policies of an economically isolated dictatorship. This specific reform is directly linked to a topic that will be discussed in the following section of this chapter: the democratisation of Iraq. Even though the questions of economic and political reforms are examined separately in this chapter, the case of the Central Bank shows how this distinction is largely untenable. This is the case to the extent that a nominally economic decision had direct ramifications for the construction of the political landscape in Iraq. In other words, by removing fiscal policy from the terrain of (mass) politics and democratic deliberation, the CPA directly impacted upon the scope of this very democratic deliberation. Even if Iraq was to become a model liberal democratic state, its citizens would be fundamentally deprived of the right to (directly) decide on questions of fiscal policy. As in the case of the Eurozone, this independence of the central bank opens up a critical 'gap' between social policy goals (employment, social security, environmental protection, etc), and the means for achieving such goals. Even though the government (or multiple governments, in the case of the EU) is entrusted with the former, they have been deprived of one significant socio-economic tool for achieving them. Therefore, Order 18 both delimited the scope of democracy by removing a crucial policy area from

[120] See Section 5:3:2 'International territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor', note 161 of the present thesis.

[121] Section 2, Coalition Provisional Authority Order Number 18, 'Measures to Ensure the Independence of the Central Bank of Iraq' CPA/ORD/ 07 July 2003/18.

[122] This was explicitly stated in the preamble of Order 18: '*Understanding* that CBI's credit and monetary policy must be free from political or other governmental interference.' Ibid. (emphasis in original).

[123] 'Only members of the CBI Board who are CBI employees serving with the approval of the Administrator may decide matters determining or implementing monetary and credit policy.' Ibid.

the domain and democratic deliberation, and it created a 'mismatch' between means and ends of policy-making that sows the seeds of crisis for democratic government.

6:2:2 Building 'low intensity' democracy: the political reforms of the CPA

In any case, the political reforms of the CPA merit separate analysis to the extent that 'democracy promotion' was one of the principal political justifications put forward to legitimise both the invasion of Iraq and the subsequent reforms.[124] Before proceeding, a clarification is required: given the complex political landscape of Iraq, this section will not attempt to analyse the concrete political manoeuvring of the CPA, including, for instance, its close alliance with the Shia population at the expense of Iraqi Sunnis, or the complicated position of the Kurds. Instead, the focus of this section will be CPA's understanding of what constituted an ideal democratic model for Iraq, trying to abstract from the specificities of everyday politics. The main argument put forward here is that the political model promoted focused on formal elements of liberal democracy, like elections and constitutionalism, while neglecting or even directly undermining enhanced democratic participation and control, and robust protection of fundamental rights and freedoms. In turn, this is linked to the neoliberal economic model promoted by the CPA, which it will be argued is in tension with a model of meaningful democratic participation.

6:2:2:1 A lower standard for self-government: the orientalist heritage of international institutions

The 'civilising mission' has always been intrinsically linked to orientalist stereotypes about the 'nature' of non-Western peoples. In Koskenniemi's words: '[i]f "barbarian" societies were uncivilized this meant they indulged in vice, lacked restraint and moderation, that they were "fanatical", untrustworthy, and uneducated. Even at best, barbarians were, in the favourite metaphor, like children who allowed their passions to rule their behaviour.'[125] Similarly, Natarajan has observed that, specifically during the British Mandate, Iraq was understood through dominant cultural stereotypes linked to British perceptions of the Ottoman Empire,[126] a pattern that that was reproduced by the US,

[124] The most interesting argument from an international legal perspective is the one put forward by Buchan: 'Notwithstanding that the CPA went beyond what was permitted under international law, what is interesting is that the CPA nevertheless aggressively pursued these sweeping liberal reforms. I have argued that for the international community the authority to introduce these liberal reforms was derived from the belief that the promotion of liberal democracy in Iraq would further the maintenance of international peace and security.' Buchan (*supra* note 90), 218-19.

[125] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001), 76.

[126] Natarajan (*supra* note 77), 813.

especially through its reliance on Iraqi exiles who had neither detailed knowledge of nor genuine links with the majority of Iraqi society.[127]

A series of statements and political choices by major figures involved with the reconstruction of Iraq support the argument that a formal, limited and weak model of democracy was deemed the only functional model given the supposedly unfree, immature and deceitful character of Iraqis. For example, the head of the CPA, Paul Bremer, had stated that: '[m]ost Iraqis have no experience of free thought. They vaguely understand the concept of freedom, but still want us to tell them what to do.'[128] Correspondingly, the CPA habitually dismissed or manipulated Iraqi objections regarding economic reforms.[129] Order 39, on investment law reform, provides a good example of this attitude. When the IGC objected to the reforms, the CPA, instead of dropping the plan, invited World Bank experts to press them further.[130] Moreover, when public opinion was unfavourable to the decisions of the administration, CPA officials or friendly commentators habitually blamed Iraqis instead of questioning the reforms. For example, in a study funded by the National Security Research Division, the authors concluded that Iraqis were disappointed with the CPA's economic management and that this was largely their own fault: '[t]his was in a large measure the product of wildly unrealistic Iraqi expectations'.[131]

Crucially, this restrictive understanding of what democracy meant for Iraq was not simply the echo of former colonial structures and the ideologies they materialised. Rather, it also corresponded with current perceptions of peacekeeping sanctioned by the UN. The Report of the Panel on United Nations Peace Operations (the Brahimi Report) warrants some attention here.[132] Being highly critical of UN's approach to peacekeeping thus far, the report suggested a more pro-active and partisan approach to peacekeeping missions and, therefore, articulated a more nuanced perception of the interaction between peacekeepers and local communities. For example, calling for mandates that enable peacekeepers to use force, the Brahimi Report stated that 'the Secretariat must not apply best-case planning assumptions to situations where the local actors have historically exhibited worst-case

[127] Ibid.

[128] Bremer (*supra* note 83), 71.

[129] 'Iraqis, like many of their Arab neighbors, were wary of full foreign ownership of domestic businesses and the privatization of the oil industry. But USAID and Treasury required the contractor to promote investment laws that would be "blind as to whether the investor is from that country or elsewhere". […] Notably absent from the thick plan was much reference to consultation with Iraqi leaders or even an interim Iraqi government. USAID and Treasury knew what Iraq needed.' Chandrasekaran (*supra* note 38) 129.

[130] Dobbins and others (*supra* note 111), 213.

[131] Ibid., 238-,39.

[132] UN General Assembly 'Report of the Panel on United Nations Peace Operations' (21 August 2000) A/55/305-S/2000/809.

behaviour'.[133] The assumption that it is the behaviour of the locals that impedes these missions – and not, for example, the failings of the UN – reveals a preconception of local populations as inherently belligerent or problematic. To recall Said: 'Orientals are inveterate liars, they are "lethargic and suspicious", and in everything oppose the clarity, directness, and nobility of the Anglo-Saxon race.'[134] In an argument extensively discussed in Chapter 5 of the present thesis,[135] Orford has argued convincingly that this trend towards associating the local or national level with conflict, strife and disorder, and the international realm with peace, harmony and stability, runs at the core of international law after the Cold War.[136] Similarly, arguing again for the need of a pro-active approach to peacekeeping, the Brahimi Report states that in certain cases a lack of action 'may amount to complicity with evil'.[137] Here, conflicts in the periphery are understood as a battle between good – often represented by the 'international community' and by innocent victimhood – and evil, and not as complex political conflicts that can be resolved through political means. After all, this sharp distinction between evil tyrants and innocent, but weak, common people is constitutive of the orientalist understanding of the periphery.[138] Finally, openly expressing its scepticism towards local political structures of deliberation, the Brahimi Report asserted that, even though consent is important, it asserted that 'in the context of intra-State/ transnational conflicts, consent may be manipulated in many ways'.[139] Moreover, the Report revealed a preference against local legal legislation, perceiving it as a tool at the hands of 'powerful local political factions' and 'crime syndicates'.[140] Crucially, the Brahimi Report was far from an isolated initiative. Rather, it had profound impact on the UN's approach to 'peacebuilding'. On the occasion of the 2000 Millennium Summit, the Security Council 'welcomed' the Report,[141] and later that year the Council committed to improving its peacekeeping

[133] Ibid., x.

[134] E. Said, *Orientalism* (Vintage Books, 1979), 39

[135] See: Section 5.3.1 'After the 'end of history': international territorial administration in the years of triumphant neoliberalism' of the present thesis.

[136] A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 Harvard International Law Journal 443, 449.

[137] Report of the Panel (*supra* note 131), ix.

[138] Said's usage of the writings of Glidden, a retired member of the Bureau of Intelligence and Research, United States Department of State, to explain how orientalists conceive conflict in the Arab world, is arguably helpful in a wider context: 'In fact in Arab tribal society (where Arab values originated), strife, not peace, was the normal state of affairs because raiding was one of the two main supports of the economy.' E. Said, *Orientalism* (Vintage Books, 1979), 49.

[139] Report of the Panel (*supra* note 131), ix.

[140] Ibid., paras. 76-83.

[141] UN Security Council Resolution 1327 (2000) 13 November 2000 S/RES/1327 (2000).

decision-making and requested the Secretariat to develop a military peacekeeping doctrine.[142] Further, even without an explicit endorsement, the UNSC adopted the principal guidelines of the Report, putting in place multidimensional mandates and robust engagement rules in cases such as, notably, Timor-Leste, the Democratic Republic of Congo, Sierra Leonne, and Burundi.[143]

6:2:2:2 The paradigm of low intensity democracy in international law and practice

The CPA's political reforms can also be seen as symptomatic of a wider pattern of limited democratisation of peripheral states after the 1980s, as well as of the transformation of liberal democracy after the ideological triumph of neoliberalism. Introduced by Gills, Rocamora and Wilson,[144] and having entered international legal scholarship through the work of Marks,[145] the concept of 'low intensity' democracy attempts to capture this trend. More specifically, the term was coined to capture 'the relative formality of this conception of democracy'[146] when 'the holding of periodic multiparty elections and the official separation of public powers are taken largely to suffice'.[147] Gills, Rocamora and Wilson developed this concept to explain the seemingly paradoxical phenomenon of expansion of formal democracy in parallel with the maintenance, consolidation and deepening of unequal relations of political and economic power. For them, 'low intensity' democracy is a fundamentally tame, pro *status quo* regime that operates as the political corollary of rapid economic neoliberalisation. For example, writing about Latin America, Gills, Rocamora and Wilson argued that the principal goal in the aftermath of the collapse of the military dictatorships was the encouragement of stable, viable "democratic" regimes that could pre-empt more radical change by incorporating broad popular forces in electoral participation, yet guarantee continuity with the anti-communist and anti-reformist traditions of their military predecessors.[148]

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[142] 'The members of the Council consider that debate a useful input on an issue that merits further study. They therefore request you to submit to the Council, by April 2001, a report on the issue, including an analysis and recommendations'. UN Security Council 'Letter dated 30 November 2000 from the President of the Security Council to the Secretary-General' (30 November 2000) S/2000/1141.

[143] S. Weinlich, *The UN Secretariat's Influence on the Evolution of Peacekeeping* (Palgrave MacMillan, 2014), 137.

[144] See: B. Gills, J. Rocamora and R. Wilson, *Low Intensity Democracy: Political Power in the New World Order* (Pluto Press, 1993).

[145] S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP, 2000), 53-75.

[146] Ibid., 53.

[147] Ibid.

[148] Gills, Rocamora and Wilson (*supra* note 143), 8.

This takes us back to the point raised in Chapter 5 about the tense relationship between the core premises of neoliberalism, such as generalised competition as a mode of governing, and democracy.[149] The concept of 'low intensity democracy' bridges the gap between two seemingly conflicting realities. If one accepts, along with Brown, that there is a fundamental tension between democracy and neoliberalism, then it appears paradoxical that the global rise of neoliberalism after 1990 coincided with the expansion of democracy. However, if one interprets the phenomenon through the lenses of 'low intensity democracy', this apparent paradox is explained away. Indeed, the spread of formal democracy became a method of legitimising and stabilising economic domination, while democracy was being deprived of its radical potential. Finally, it is essential to bear in mind that 'low intensity democracy' is a precarious, fragile form of democracy. While neoliberalisation increases social tensions, asymmetries in the distribution of resources and social polarisation,[150] due to its formal and superficial character the political system is unable to channel and reconcile divergent social interests. As Marks points out, the accentuation of social crises leads to a (re)introduction of authoritarian measures, while 'low intensity democracy' appears unable to deliver even its limited promises.[151]

The rapid demise of democracy in Iraq after the formal end of the occupation in 2004 highlights the relevance of the above observations. Therefore, it is essential to understand how the reforms of the CPA contributed to subsequent events. To begin with, the CPA was determined to dictate the pace and the modalities of Iraq's transition to democracy leaving limited, if any, space for actual, grassroots mobilisation. In this context, the CPA intervened to stop provincial elections being worried about their outcome, as happened in Najaf, in central Iraq.[152] Moreover, and even though the quick

[149] See: Section 5:1 'A new international paradigm in the making: the historical origins and conceptual underpinnings of neoliberalism' of the present thesis.

[150] 'As is widely recognized, neo-liberal economic reform tends to exacerbate disparities between rich and poor, both within states and among them. As economies are opened to the forces of transnational capital, and as states are dedicated to servicing those forces, asymmetries in the distribution of material and cultural resources become magnified.' Marks (*supra* note 144), 58.

[151] Ibid.

[152] 'Lieutenant General James Conway, Commander of the 1st Marine Expeditionary Force, which controlled Najaf in central Iraq, took a different approach. He scheduled province-wide elections so that Iraqis could directly choose a new provincial council. Conway, who would later become the Commandant of the Marine Corps, set the elections for July 4, 2003. By mid-June, the Marines had registered political parties and were printing ballots. When Scott Carpenter, CPA's Director of Governance, found out about Conway's plan, he told him that Iraq had neither a constitution nor an electoral law upon which to base such an election. Ambassador Bremer also said he was concerned that Shi'a Islamist parties "would clamor for them across the south since they were most likely to win in those early days." At the last moment, the CPA persuaded Conway to cancel the elections.' SIGIR (supra note 86), 116.

establishment of a democratic regime appeared to be a shared goal between the UN and the CPA, the fact-finding mission led by a familiar figure, the Secretary-General's Special Adviser Brahimi, advised against holding elections by the end of June 2004.[153] This view was then endorsed by UNSC Resolution 1546, which designated January 2005 as the new deadline.[154] This was the case despite multiple voices from both in and outside Iraq warning that postponing the elections would aggravate the then-unfolding crisis.

Practicalities aside, these events indicate how the political reforms in Iraq 'have sought to establish democracy in one sense of the term, while blocking it in a different sense'.[155] Once again, it is essential to situate these reforms within the broader experience of ITA since the 1990s and to avoid reproducing the fallacy of 'American hubris' or 'American unilateralism' when analysing them. The Brahimi Report,[156] the UN, the EU and other international legal actors all had embraced a formalistic approach to democracy in BiH, Kosovo or East Timor. Ranging from the open disregard of the rights of the Serbs or Roma residing in Kosovo, to an obsession with conducting elections regardless of whether they were fair and meaningful, and from the fact that crucial positions were fulfilled by unelectable, unaccountable international bureaucrats in Kosovo to the uncontested decision that social-owned enterprises both in BiH and Kosovo needed to be privatised,[157] the UN had endorsed and applied the most inflexible models of 'low intensity democracy' in multiple contexts.

Similarly, the relation of the CPA with civil liberties and human rights in Iraq was complicated and contradictory. While human rights rhetoric was again central to the invasion and the occupation, since the CPA consistently declared that it had liberated Iraq and the Iraqis,[158] the facts on the ground were

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[153] UNSC, 'Letter dated 23 February 2004 from the Secretary-General to the President of the Security Council' (23 February 2004) S/2004/140.

[154] '*Endorses* the proposed timetable for Iraq's political transition to democratic government including: holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005.' UNSC Res. 1546 (8 June 2004) S/RES/1546 (2004) (emphasis in original).

[155] N. Chomsky, 'The Struggle for Democracy in the New World Order' in Gills, Rocamora and Wilson (*supra* note 143), 80.

[156] See section 6:2:1 'A lower standard for self-government: the orientalist heritage of international institutions' above.

[157] For an overview of the political reforms promoted in the context of ITA, see Section 5.3.2. 'Post-1991 international territorial administration and the normalisation of neoliberal state-building: Bosnia and Herzegovina, Kosovo, East Timor' of this thesis.

[158] Shortly before the invasion of Iraq, George W. Bush publicly stated that: 'America's interests in security, and America's belief in liberty, both lead in the same direction: to a free and peaceful Iraq. The first to benefit from a

more complicated. For example, Order 14 prohibited any media activity that advocated the return of the Ba'ath party to power,[159] while Order 19 placed heavy restrictions upon the right to protest, which practically impaired its exercise.[160] Similarly, the CPA devoted much of its energy in attempting to restrain Al-Jazeera's broadcasting. Even accounts of the occupation sympathetic to the CPA acknowledge that senior Bush administration officials had unsuccessfully contacted Qatar, trying to alter the 'tone and content' of Al-Jazeera's reporting,[161] and Decision 48 of the IGC closed down the broadcaster for one month.[162] Hence, in the absence of formal democratic institutions, the CPA adopted a restrictive approach to the very rights that enable public mobilisation and the political influence of those otherwise unable to access decision-making centres. The move to authoritarianism on the face of mounting tensions, as described by Marks above,[163] only took a few months to materialise in Iraq.

This limited understanding of democracy was also expressed through the *Law of Administration for the State of Iraq for the Transitional Period* (TAL hereafter). The document was drafted by a ten-man committee, with close co-operation with US and UN officials, and came into force on the 28th of June 2004, when occupation ended officially. TAL was effectively Iraq's Constitution until the adoption of the 2005 Constitution and embodied multiple aspects of 'low intensity democracy'. To begin with, the process of drafting and enactment of the TAL has attracted widespread criticism for its lack of

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free Iraq would be the Iraqi people, themselves. Today they live in scarcity and fear, under a dictator who has brought them nothing but war, and misery, and torture. Their lives and their freedom matter little to Saddam Hussein -- but Iraqi lives and freedom matter greatly to us.' G. W. Bush, 'Speech to the American Enterprise Institute' (*The Guardian*, 27 February 2003), available at: http://www.theguardian.com/world/2003/feb/27/usa.iraq2 [last accessed 24 April 2016]; 'We all know the importance of the task which brings us here, but we must not forget those who died bringing liberation, peace and dignity to the people of Iraq. I am thinking of the brave men and women of the Coalition who fought to make the world safer and to free Iraq from terrible tyranny.' 'Bremer Traces Political, Economic Advances in Iraq' (Address to Donors Conference, 24 October 2003), available at: http://iipdigital.usembassy.gov/st/english/texttrans/2003/10/20031025154220relhcie0.754925.html#axzz4162d5hP7 [last accessed 24 April 2016].

[159] Coalition Provisional Authority Order Number 14, 'Prohibited Media Activity' CPA/ORD/10 Jun 2003/14.

[160] 'It is unlawful for any group or organization or any individual acting with such group or organization, to conduct or participate in any march, assembly, meeting or gathering on roadways unless limited to such numbers as, upon the determination of an Approving Authority, will not unreasonably obstruct pedestrian or vehicular traffic.' Section 3.2 Coalition Provisional Authority Order Number 19 'Freedom of Assembly' CPA/ORD/09 July 2003/19.

[161] Dobbins and others (*supra* note 111), 192.

[162] Ibid.

[163] See note 148 above.

democratic, or even representative, credentials.[164] Moreover, its content was problematic in multiple ways. For example, Article 26 stipulated that: 'The laws, regulations, orders and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.'[165] Given how dysfunctional the law-making process was in post-occupation Iraq, Article 26 meant in practice that the CPA's reforms were to be maintained, at least until the first democratically elected government reversed them. Moreover, Article 31 appeared to stipulate vague, arbitrary or excessively exclusionary criteria as for who could be a nominee for the National Assembly, including having 'a good reputation' and a secondary school diploma, in a state in which the educational structures had been poor for decades.[166] Thirdly, TAL established a non-secular state to the extent that Article 7 designated Islam as the official religion of the State and elevated Sharia into a source of law.[167] This was novel to the degree that Iraq had been for decades a secular dictatorship, and it revealed the readiness of the CPA to combine an aggressively neoliberal economy with social conservativism. Bremer's statement that 'Sharia can coexist side by side with Western secular law, as it does here in Qatar, as long as Sharia is limited to family issues'[168] supports the argument that Iraq's 'low intensity democracy' appeared compatible with non-liberal, non-secular, non-egalitarian forms of legislation, especially when it came to matters understood as private.

Finally, it is argued that the promotion of neoliberalism was intrinsic to the establishment of this low intensity democratic model and vice versa. Gills, Rocamora and Wilson cryptically advance a similar point when arguing that 'the new formal democratisation is the political corollary of economic liberalisation and internationalisation'.[169] As the example of the central bank invoked earlier shows, the CPA intentionally diminished the decision-making processes subjected to political and, if democracy was to be established successfully, democratic control. Similarly, the entirety of the CPA's decisions that outsourced, privatised or internationalised decision-making on economic issues meant automatically that the sphere subjected to political or democratic control was accordingly diminished. Arguably, subsequent Iraqi governments could reverse these reforms. This is an argument that deserves to be taken seriously. Hence, the continuation of similar policies cannot be wholly attributed to the reforms of the CPA, but must also be sought in domestic structures of power and social

[164] See generally: A. Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press, 2009).

[165] Article 26.c *Iraq: Law of 2004 of Administration for the State of Iraq for the Transitional Period* (8 March 2004) Available at: http://www.refworld.org/docid/45263d612.html [last accessed 17 June 2015].

[166] Article 31 ibid.

[167] Article 7 ibid.

[168] Bremer (*supra* note 83), 73.

[169] Gills, Rocamora and Wilson (*supra* note 143), 4.

struggles. However, the reversal of such profound reforms can be impracticable, especially for a state politically torn and economically unstable. Moreover, this argument does not negate the fact that the economic reforms promoted by the CPA delimited the space for political deliberation and democratic decision-making to the extent that

> it is a conceptual error to suppose that the democratic reversibility [of independence] is, from the normative point of view, equivalent to democratic control of policy. Democracy is not maintained by the possibility of restoring it – the elected local government of London was abolished, being replaced with executive control, and was then restored. It is uncontroversial that, whatever else may be the case, in the interim, Londoners were governed less democratically.[170]

Conclusion

Engaging with liberal critiques of the 2003 invasion of Iraq, Douzinas raised a crucial point: liberal scholars and politicians who were enraged with US/UK exceptionalism and their disregard for international law in the case of Iraq, remained silent or even applauded the bombing of Kosovo four years earlier.[171] Discussing post-conflict reconstruction instead of *jus ad bellum*, this chapter raised a similar issue. Discussing UN Security Council Resolution 1483, I have argued that it is simplistic and inaccurate to describe the political and economic reforms of the CPA as simply illegal. Rather, a series of international legal norms and practices, including ITA, structural adjustments, the development of regional integration mechanisms, such as the EU and the Eurozone, and thousands of BITs, had set the framework for the said reforms by gradually introducing a specifically neoliberal form of international legality. It is, therefore, argued that Iraq needs to be situated within a broader process of legal transformation that was in motion at least since the early 1990s. Even though it is not the purpose of this thesis to map this transformation in its entirety, it is argued that international law assumed once again clear disciplinary functions legitimising, enabling and imposing the establishment of neoliberal models of statehood on a global level.

The case of Iraq documents the continuing implication of international law in the diffusion of the CMP on a global level. More specifically, the attempted neoliberal transformation of Iraq needs to be situated within a broader spectrum of capitalist state-building through international law and international organisations that has its roots in the nineteenth-century 'standard of civilisation' and the

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[170] Forder (*supra* note 62), 164.

[171] 'Kosovo was at least as blatant a violation of international law as was Iraq, but it did not attract the ire of liberal lawyers. In a book entitled *Lawless World*, not a single page is devoted to Kosovo or Afghanistan, except for the oblique comment that "the intervention in Kosovo provided the only real hint that the rules of international law might need to be revisited, but this would be in order to promote respect for human rights".' C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007), 214. See also: A. Rasulov, 'Writing about Empire: Remarks on the Logic of a Discourse', (2010) 23 Leiden Journal of International Law 449.

practice of extraterritoriality, while it was linked to international institutions through the experience of the Mandate System. This is not to say that international law has remained unchanged since. However, despite real and significant changes, international law retains its function as an enabling mechanism for the diffusion and reproduction of the capitalist relations of production. After 1990, this synergy witnessed a further twist, since international law became a primary method for the dissemination of the neoliberal model of capitalist accumulation around the globe. If a sentiment of crisis prevails among (certain) international lawyers, this is due to the hegemonic crisis of the model with which the discipline became intertwined.

Conclusion

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way.

Charles Dickens, A Tale of Two Cities

Critical histories of international law: reconstructing the past, challenging the present

Since a complete, accurate and impartial reconstruction of the past is an exercise that is both elusive and pointless,[1] historical narratives can only be partial, and therefore political. This positionality is more frequently admitted in the context of the critical legal canon,[2] but it is in no sense a unique characteristic of critically-minded international lawyers. Embracing its positionality, this thesis aimed to reconstruct the history of international law in the context of its intersection with the history of capitalist expansion outside its original spatial matrix, i.e. Western Europe. More specifically, I argued that central international legal doctrines, such as the concept of civilisation, as well as the expansion of international law *as such*, were and still are intrinsically linked to the process of spreading, consolidating and legitimising the capitalist mode of production on a global scale.

The starting point of my inquiry was the era around the mid-nineteenth century. During this time, international law arose as a distinct profession and academic discipline,[3] while the revival of imperial

[1] 'Critical histories do not doubt that certain events "occurred". Historical records, such as official public records, can rectify the reality of some events. Critical approaches, however, underline the fact that disputes about history, at least in their majority, do not concern the reality of facts but rather the selection of facts included in the historical account and the relationship between them. Knowing what happened does not tell you what it means.' T. Skouteris, 'Engaging History in International Law' in J. M. Beneyto and D. Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (Springer, 2012), 112-13.

[2] 'That there will be losers and excluded parties are not an unfortunate by-product of the political world, by the very purpose of struggle: to fight for some condition that will change the distribution and well-being of particular individuals and communities always comes as theft and sacrifice to others. […] Let us say, so be it. As progressive international lawyers committed to a better world, let us leave the comforts of the condemnation of warfare and venture forward into some battle, whatever that might be.' J. D. Haskell, 'Hugo Grotius in the Contemporary Memory of International Law' in J. M. Beneyto and D. Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (Springer, 2012), 146.

[3] '[M]odern international law did not "begin" at Westphalia or Vienna, and the writings by Grotius, Vattel, G. F. von Martens or even Wheaton were animated by a professional sensibility that seems distinctly different from what began as part of the European liberal retrenchment at the meeting of the *Institut de droit international* and

adventures was now led by centralised, industrialised, capitalist states. Even though it is implausible and unnecessary to reduce imperialism entirely to capitalism and its 1873 crisis, the links between the two are too tight to miss. Colonies, semi-colonies and *de facto* dependent states provided great opportunities for capitalist valorisation at times when European capitalism seemed to be running out of steam. However, if capital *is not a thing but a social relationship*, then for this valorisation to take place it was essential for these colonies and semi-colonies to be transformed into capitalist societies. International law assumed a central role in this process of capitalist state-building. In this respect, Chapter 1 has shown how the standard of civilisation performed a crucial role of exclusion-inclusion for international law. By setting vague, yet specifiable, criteria as for which political communities were participants in the society of civilised states, international law excluded those communities not exhibiting the core characteristics of a modern, capitalist state. Christian moralism and racial thought were part of the repertoire – the latter, increasingly so.[4] Still, what decided the inclusion or the exclusion of political communities in the final analysis was whether a given political community exhibited a centralised, bureaucratic state structure with factual and legal monopoly over violence, the legalisation of social relations both domestically and internationally, and the corresponding dichotomy between the two spheres. The guarantee of certain individual rights that were necessary both for the everyday function of trade and capitalist production and for the construction of free and equal individuals able of selling their labour power and finally, the abolition of pre-capitalist relations of production, such as slavery, that were hindering the development of a labour force under the discipline of the market were also essential for becoming a full subject of international law.

Even though this process is observable in many contexts, semi-colonies provide a particularly good example due to the overt operation of international law and the relatively diminished role of colonial powers' arbitrariness found in colonies proper. Comparing the extraterritorial experiences of Japan and the Ottoman Empire, Chapter 2 of the present thesis substantiates the connection between the standard of civilisation and capitalism. Indeed, the establishment and abolition of extraterritoriality needs to be understood as a process of temporary exception (from local jurisdiction), in order to

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the pages of the *Revue de droit international et de législation compare* from 1869 onwards.' M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001), 4.

[4] 'Spanish and Portuguese greed wore a religious cloak; bourgeois Holland and England represented a new society that took naked class division for granted, without holy water or feudal camouflage, and could regard a frank confrontation of higher and lower races as no less natural.' V. G. Kiernan, *Imperialism and its Contradiction* (Routledge, 1995), 101; 'During the nineteenth century, colonialists and their allies in the scientific community interpreted the Darwinian postulate that human nature is uniform and universal to support the racist theories that justified colonialism. They did so over the objections of prominent scientists, including Darwin himself, who disavowed the racist abuses of science by colonial apologists.' S. N'Zatioula Grovogui, *Sovereigns, Quasi-Sovereigns and Africans* (University of Minnesota Press, 1996), 37.

establish a new normality. This normality entailed the establishment of these institutions and legal apparatuses necessary for the establishment and reproduction of capitalist relations of production: property rights, commercialisation of land, abolition of legalised feudal relations, and also proficiency in the vocabulary of international and domestic law were essential preconditions for becoming a civilised state, and therefore abolishing extraterritoriality. This process also reveals the dialectic and contradictory character of international law's function: the more successful this transformative process, the more intolerable the hierarchical assumptions of the discipline were becoming. In a fine dialectical move, this very success of nineteenth-century international law also signalled its death knell, creating a world of competing nationalisms seeking self-determination even outside the West.[5]

This was a prolonged and painful death. The First World War shook some of the civilisational assumptions of international lawyers, although without challenging the core of the civilising mission. Political exigencies of the time forged innovation in the realm of colonial administration, and the Mandates System arose as such an innovation. Chapter 3 focuses on this continuation of imperialism by other means, focusing not only on its continuities, but also on the novelties of the situation. With regard to continuity, it is worth emphasising the persistence of the criteria for what constitutes a 'civilised' state. With the moralistic language of the previous generation in decline, the independence of Iraq in 1932 provided an excellent opportunity for the explicit systematisation for the concept by an international institutional body: capitalist state-building through the establishment of a centralised government factually, legally and financially capable of managing capitalist expansion was at the core of the System. With regard to rupture, welfarism entered the equation of colonial management as a means of safeguarding the long-term sustainability of capitalism against its own self-destructing tendencies. Moreover, the entry of international institutions in the equation paved the way for their future central role in the organisation of global capitalism.

Nevertheless, the bureaucrats of the League proved unable to stop both the Second World War and the cataclysmic events that followed it. With specific regard to the colonies, nineteenth-century international law collapsed under the burden of its own success. Chapter 4 suggests that decolonisation took the form of state-building precisely because of the relative success of the disciplinary techniques of international law. However, decolonisation and the subsequent effort for a New International Economic Order were moments of contestation and uncertainty, rather than instances of teleology. Experiments in African socialism were initiated, but they need to be viewed as attempts to negate the material effects of international law in the fabric of colonial societies. Despite

[5] Marx himself was a thinker of productive contradictions: 'The capitalist mode of appropriation, the result of the capitalist mode of production, produces capitalist private property. This is the first negation of individual private property, as founded on the labour of the proprietor. But capitalist production begets, with the inexorability of a law of Nature, its own negation. It is the negation of negation.' K. Marx, *Capital: A Critique of Political Economy* (Lawrence and Wishart, 1954), Volume I, 715.

its ambitions, nothing similar can be said about the NIEO. Centred around the concept of development and oscillating between sovereignty and community the project sought to bring about numerous reforms that would bridge the gap between the First and the Third World. In its steady denial to challenge domestic structures of power, statism and capitalist inter-dependence, NIEO needs to be read as the logical extension of colonial international law, rather than its radical negation.

NIEO was not defeated from the left, but from the right. In retrospect, the 1970s are not remembered as the age of developmentalism, but rather as the defining moment for the emergence of a specific form of capitalism, the neoliberal paradigm. Going back to the 1930s, Chapter 5 argues that, in their attempt to save both liberalism and capitalism from themselves, neoliberals re-invented both. Generalised competition and, in our case, the internationalisation of economic decision-making were two core pillars of the neoliberal project. Still, the material conditions of the international realm did not allow for this project to unfold fully until the 1990s. Comprehensive changes in the fabric of international law occurred, including the numerical expansion and qualitative transformation of international territorial administration. Bosnia and Herzegovina, East Timor and Kosovo were elevated into laboratories of neoliberal experimentation, while core assumptions of the international law of occupation were implicitly or explicitly challenged.

If this is the case, the neoliberal reform of Iraq after the 2003 invasion cannot be addressed satisfactorily by simply situating it on the lawful-unlawful binary. Discussing the comprehensive neoliberal reforms implemented by the Coalition Provisional Authority, my analysis turns to UN Security Council Resolution 1483, which partly set the international legal framework for the occupation. Indeed, a close reading of the Resolution reveals its close ties with previous experiments of neoliberal international territorial administration under the auspices of the UN. It is, therefore, argued that it is much more intellectually productive and politically useful to think the reforms of the CPA and international law of the time as mutually constituted, rather than as being in direct tension with each other. In this respect, Iraq needs to be conceptualised as a distinct phase of capitalist state-building facilitated by international law. The peculiarity of this instance, along with other cases of international territorial administration examined in Chapter 5, is that this nexus of international legal and institutional practices promoted a specific model of capitalist accumulation: neoliberalism.

The above narrative does not assume an uninterrupted, undifferentiated continuity in the relationship between international law, imperialism and capitalism. If anything, the period under examination was marked by one of the greatest ruptures this relationship ever experienced: the October Revolution and the establishment of a number of states professing not to be capitalist. If my narrative gives a sense of uninterrupted continuity, it is in my effort to map the under-examined relationship between international law and capitalist relations of production. Since spatial expansion in search of increased valorisation opportunities is at the heart of the capitalist mode of production, a normative system that

guarantees the conditions necessary for this valorisation is needed. National statehood and national bourgeoisies played this role successfully – and still do – but only to an extent. When capitalist expansion was happening faster than the political and institutional transformation able to support it, as was the case during the second half of the nineteenth century, international law partly bridged the gap between the two. From extraterritoriality to the reformist efforts of the Mandate System, and from *uti possidetis* during decolonisation to international territorial administration, international law assumed crucial functions of social engineering towards the creation of centralised states that would act as guarantors of the capitalist mode of production. In this chain of events, the neoliberal reconstruction of Iraq serves as a focal point, both of continuity and of rupture. Its analysis establishes the contemporary relevance of the historical narrative: the role of international law and institutions in the process of capitalist transformation and engineering of the state remains of importance However, we are also witnessing a moment of rupture for two distinct, yet interrelated, reasons. First, the case of Iraq indicates a crucial narrowing of the hegemonic international legal agenda, to the extent that the bias of the discipline now lies with a specific model of neoliberal capitalism seeking to subject to the discipline of competitive markers ever-expanding aspects of human life. Secondly, it is partly due to this very narrow and specific outlook that this hegemonic (legal) conception is in profound crisis. Indeed, if international law is in a state of crisis, as will be argued below, this is because the hegemonic neoliberal model with which it is closely linked is in crisis.[6]

Why Marxism? Why now?

Writing during the period between the intervention in Kosovo and the invasion of Iraq, Hilary Charlesworth argued that the discipline of international law is prone to reinvent itself in times of crisis, and not in particularly fruitful ways: '[w]hile international lawyers are generally not obsessed with great men as individuals, we are preoccupied with great crises, rather than the politics of everyday life. In this way international law steers clear of analysis of longer-term trends and structural problems.'[7] In the present conjuncture, thinking in terms of crisis through Marxian lenses is precisely the way to shed light on the structural social problems linked to the biases of international law. This thesis was finalised in the temporal intersection of at least two major crises. First, the economic crisis

[6] It is telling that even figureheads of the International Monetary Fund, the beacon of neoliberal reform, now ask publicly whether the neoliberal model has been oversold: D. Ostry, P. Loungani and D. Furceri, 'Neoliberalism Oversold?' (June 2016) 53 IMF Finance and Development 38.

[7] H. Charlesworth, 'International Law: A Discipline of Crisis' (2002) Modern Law Review 377, 389. 'Wars, forced migrations, environmental catastrophes, pandemic outbreak, trade breakdowns, mass grave exhumations, technological breakthroughs: the international legal imaginary is littered with ruptive instances. […] Of such acute moments is a sense of disciplinary life strung together; of the episodic international law makes an everyday.' F. Johns, R. Joyce and S. Pahuja 'Introduction' in F. Johns, R. Joyce and S. Pahuja, *Events: The Force of International Law* (Routledge, 2011), 1.

that erupted in the aftermath of the US subprime crisis of 2007-2008 turned out to be the worst capitalist financial crisis since the 1930s Great Depression.[8] The unleashing of the destructive tendencies inherent in the logic of capitalist accumulation is a good entry point for discussing the synergies between international law and the structural violence of the capitalist mode of production. If my thesis invites its readers to rethink international law as 'letters of blood and fire',[9] it does not do so by invoking specific colonial massacres or colonial encounters of particular brutality and terror, such as Congo under King Leopold.[10] Even though these are undeniable, examining them as isolated incidents would distract our attention from instances of structural domination, dispossession and exploitation that do not necessarily match the grotesque events of the Mau Mau rebellion's suppression in Kenya[11] or of Syria's bombing during the Mandate era.[12] In this respect, discussing international law's implication with capitalism's structural violence in the immediate aftermath of a historic capitalist crisis enables us to reflect on the discipline's role in perpetuating and, indeed, deepening these relations of domination in the present era. Secondly, this thesis was completed in a time of intense conflict in the Middle East, which is 'felt' in Europe predominantly as a refugee crisis. Given that these events are seen as somehow important for international law,[13] there needs to be a

[8] 'The Great Recession has impacted more people worldwide than any crisis since the Great Depression. Rooted in bad government policy and worse corporate behavior in the United States, the American financial meltdown was globalized with devastating consequences, raising fundamental questions about global capitalism.' B. Clark, 'Introduction: The Discontents Confront Crisis' in B. Stark (ed.), *International Law and its Discontents* (CUP, 2015), 2.

[9] Marx (*supra* note 5), 669.

[10] 'Frequent uprisings were suppressed by Leopold's Force Publique, whose methods of warfare included massacres of the populations of whole villages, the notorious severing of the hands of killed or sometimes simply recalcitrant natives, and the destruction of native cattle and crops. Though statistics of the period are unreliable, as many as 8-10 million Congolese died as a result of these measures.' Koskenniemi (*supra* note 3), 158.

[11] Amongst many: J. Newsinger, 'Revolt and Repression in Kenya: The "Mau Mau" Rebellion, 1952-1960' (1981) 45 Science and Society, 159; D. M. Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (Weidenfeld and Nicolson, 2005).

[12] 'Those easy assumptions about civilizational hierarchies and Arab fanaticism could not, however, accommodate the eyewitness account of the bombardment of Damascus that *The Times* ran on 27 October. There, readers learned for the first time of the French army's burning of villages, its display of the rebel corpses in Damascus, and the use of tanks in the city's narrow streets. But it was the bombardment – the wanton destruction of an ancient and beautiful city and the subjection of its civilian inhabitants to terror and fire – that really turned civilizational assumptions on their heads.' S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP, 2015), 147-48.

[13] The call for papers of the annual conference of the European Society of International Law in 2016 read as follows: '[t]he territorial integrity of many States continues to be undermined. The rise of ISIS and the

discussion as to how these two are related, and how international lawyers ought to respond to this crisis. However, this presupposes a common understanding of what is the precise content of the crisis. Some might view it as an apocalyptic humanitarian catastrophe, a challenge for international refugee law and human rights. Intellectual exercises for the prosecution of the Islamic State and/or the Assad regime rely on the presumption that impunity is the greatest of all crises. My thesis, and more specifically Chapters 5 and 6, contests these approaches, arguing that the collapse of Iraq, with its broader ramifications for the region, need to be understood as a part of a failed experiment of state transformation along neoliberal lines. Acknowledging the central role of international law in this process is a first step in reflecting sincerely on the role of international law in the constitution of asymmetrical relations of power, and their destructive social effects, which we currently witness. Therefore, the choice of the conceptual framework of this thesis reflects a determination to think about social structures of domination linked to the asymmetrical relations people develop when reproducing the material conditions of their very existence. For this reason, Marxism, as a prism for analysis of international law, might not provide an exhaustive account of its social functions, but enables us to re-interpret decisively the unfolding crises as structural, rather than incidental or irrational and inexplicable, outbursts of violence and cruelty. Moreover, the conceptualisation of international law as an apparatus of capitalist state-building enables us to escape a number of false dichotomies that run at the core of the discipline's collective imagination. One such problematic dichotomy is that between the state and the individual; another, that between state intervention and the 'free market'; and a third, between the nation-state and international law and institutions. A Marxian

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continued proliferation of other violent extremist groups provide serious challenges to the world order we have striven to build. Crises around the world range from more traditional threats to territorial integrity and security, through the use of modern technology or forms of warfare to more fundamental challenges to the planet through climate change and environmental threats. [...] Many of these developments are interlinked. For example, the unprecedented flow of migrants and refugees into Europe is linked to security, the economy, and climate change.' European Society of International Law, 12th Annual Conference, 'How International Law Works in Times of Crisis' available at: http://www.rgsl.edu.lv/uploads/files/ RGSL_ESIL_Call_for_Papers_2016.pdf [last accessed 23 June 2016]. Similarly, the call for papers of the Canadian Council for International Law in 2016 was centred around the idea of overlapping crises: '[t]he international community faces crises on numerous fronts across all dimensions: social, political, economic, and environmental. In fact, it can be applied to almost any international law issue. As such, international law has been called on to tackle pressing subjects like climate change, genocide, fluctuating oil prices, unstable economies, human migration, disease outbreak, poverty, consumerism/consumption, war, species extinctions, corporate instability, and lack of governance.' Canadian Council for International Law, 45th Annual Conference 'The Promise of International Law: Solutions for the World's Crises', available at: http://www.ccil-ccdi.ca/#!CCIL-45th-Annual-Conference-The-Promise-of-International-Law-Solutions-for-the-World's-Crises-Nov-35-2016-Global-Affairs-Canada-Ottawa/c1bcl/570672ba0cf2c53596abe26 [last accessed 23 June 2016].

theory that simultaneously appreciates the role of law – domestic or international – in the constitution of capitalist relations of production enables us to grasp the co-constitutive nature of these problematic binaries.

On the impossibility of redemption and the necessity of tactics

If the above critique is correct, where does that leave those international lawyers who subscribe to it in relation to our discipline? As in the case of most critical legal projects, the temptation of a final, and unexpected, redemption is considerable,[14] and (even more) so is the temptation of a clear-cut rejection.[15] Still, as Robert Knox has pointed out, the dilemma 'redemption or nihilism' is a false one.[16] A third, much more politically viable and intellectually consistent, option is one of tactical engagement with international law:

> this is a false dilemma, since actualising strategic concerns does not necessarily mean jettisoning practical interventions in everyday legal struggles, but rather framing these struggles in terms of the overall strategic goal. It was argued that a position of "principled opportunism" offered the best scope for intervening in conjuctural legal debates without losing sight of the strategic goal.[17]

In this context, international law can be mobilised in order to assist the struggles of the exploited and the oppressed. This is the case for at least two reasons. First, the historic defeat of organised labour and the political left in the last quarter of the twentieth century has left this bloc at a significantly disadvantaged position. In this context, institutions and techniques initially introduced to counter labour radicalism and to prevent the possibility of revolutionary change, such as Western European welfarism, are now dismantled to the detriment of the exploited and the oppressed. In this context, tactical alliances with forces such as the International Labour Organization or with these factions of international bureaucracies that support socio-economic rights can be fruitful or even tactically inevitable. After all, Marx was a staunch supporter of struggles for the amelioration of the living conditions of the working class, notably struggles over the length of the working day:

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[14] See, for example, Koskenniemi's redemptive call for a 'culture of formalism': Koskenniemi (*supra* note 3), 494-509. 'I continue to hope, together with the many scholars who are working to reconstruct an international law precisely because of their awareness of the many ways in which it has operated to exclude and subordinate people on account of their gender, race and poverty, that international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power.' A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005), 318.

[15] 'The chaotic and bloody world around us is the rule of law.' C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books, 2006), 319.

[16] 'The problem is that this counterposition of liberal legalism as against legal nihilism ultimately reproduces the rigid theory/practice divide outlined above, and essentially insists that strategy and tactics exist to the rigid exclusion of one and other.' R. Knox, 'Strategy and Tactics' (2010) 21 Finnish Yearbook of International Law 193, 214.

[17] Ibid., 227-28 (emphasis in original).

> For "protection" against "the serpent of their agonies", the labourers must put their heads together, and as a class, compel the passing of a law, and all-powerful social barrier that shall prevent the very workers from selling, by voluntary contract with capital, themselves and their families into slavery and death. In place of the pompous catalogue of the "inalienable rights of man" comes the modest Magna Carta of a legally limited working-day, which shall make clear "when the time which the worker sells is ended, and when his own begins.[18]

Secondly, this tactical engagement acknowledges that even international law is the product of political contestation. If indeed we acknowledge the centrality of the class struggle within the universe of Marxian philosophy of history, then the effects of these struggles on the fabric of law need to be taken seriously into account. There is little doubt that, without social struggles, the bulk of social legislation and significant aspects of civil liberties in many states would never have come to be:

> [T]he capitalist legal system also takes the dominated classes into account in regulating the exercise of power. Faced with working-class struggle on the political plane, law organizes the structure of the compromise equilibrium permanently imposed on the dominant classes by the dominated. It also regulates the forms in which physical repression is exercised: indeed, we need to stress the fact that this juridical system, these "formal" and "abstract" liberties are also conquests of the popular masses.[19]

However, this does not mean that progressive social actors encounter international law as an empty vessel that can be filled with any content. After all, the main point of this thesis was to document the pro-capitalist bias of international law. International law is emphatically not a neutral space in which classes with competing interests meet to negotiate or that it can be claimed by any class interest on an equal footing. Much more so, in the arena of international law, social struggles are more often than not mediated by (capitalist) states that filter and transform progressive demands through their bureaucratic and legalistic lenses. Even in cases when states ambivalent towards capitalism mobilised in order to bring about international legal change, such as the insertion of the concept of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties, the results were at best underwhelming.[20] In this sense, our tactical engagement with international law cannot descend into a 'suspension of disbelief in law's dark potential'.[21] After all, the ILO was established as a response to the October Revolution and constituted a successful paternalist alternative to workers' radical emancipation, and social rights have often served as a substitute for radical wealth redistribution. Therefore, it is essential that our tactical reliance on, and defence of, international law does not happen in ways that in fact undermine the potential for social emancipation that goes beyond tactical gains. If the denouncement of the unilateralism of the US under Bush's administration entails uncritical praise of the UN and its (comprehensively imperialist) Security Council or support for the increased justicialisation of

[18] Marx (*supra* note 5), 285-286.

[19] N. Poulantzas, *State, Power, Socialism* (Verso, 2000), 92.

[20] See: U. Özsu, 'An Anti-Imperialist Universalism? *Jus Cogens* and the Politics of International Law' in M. Koskenniemi, W. Rech and M. Jiménez Fonseca (eds), *International Law and Empire: Historical Comparisons* (OUP, 2016) (forthcoming).

[21] D. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016), 246.

international relations, then our resistance to imperialism is both superficial and fragile.[22] Crucially, this is a critique that precludes any confrontation with the structural imperialism and violence of the international legal system. If multilateralism is the antidote to imperialism, then the horrors of the UN's actions in Haiti,[23] or the neoliberal engineering of Kosovo or East Timor by the UN,[24] are excluded from the realm of critique or, even worse, indirectly condoned and legitimised. We need to resist the temptation of fighting battles in ways that make it more difficult to win the war.

In a nutshell, progressive and radical lawyers' engagement with international law should be centred around the understanding that, in the final analysis, our commitment does not lie with our discipline, but with social emancipation. Occasionally, these two are compatible and international law could be a useful tool in moving towards emancipation, but this is not necessarily the case. If my analysis is correct, it is not only central international legal concepts, but even the expansion of international law *as such* after the 1990s that consolidated capitalist expansion and transformation. In such a context, our engagement with our discipline should always be informed by the conviction that the path to an emancipated society passes not only through a different international law, but also through less international law.

[22] Writing in a similar context, Rasulov attacked those critiques of the 2003 invasion that ended up 'whitewashing' international legality: 'Between its uncritical acceptance of the old-line Westphalian mythology and its unreflective support for supranational juridification as the most effective weapon against neo-imperialism, not only does it manage to propagate a completely fabricated narrative of historical progress – the very stuff of conservative utopia – but it also distracts and redirects its audience's political attention towards causes and projects whose pursuit, in the final analysis, is at best completely pointless, at worst, downright counterproductive.' A. Rasulov, 'Writing about Empire: Remarks on the Logic of a Discourse' (2010) 23 Leiden Journal of International Law 449, 453.

[23] See: C. Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism' (2008) 19 Finnish Yearbook of International Law 63; R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 London Review of International Law 81.

[24] See Section 5:3:2 'International territorial administration and the normalisation of neoliberal state-building: Bosnia, Kosovo, East Timor' of the present thesis.

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